

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

FEBRUARY 8, 2019

**MAILING ADDRESS: The Judicial Department
P. O. Box 2170, Raleigh, N. C. 27602-2170**

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OF
NORTH CAROLINA**

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FILED 1 NOVEMBER 2016

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CONSTITUTIONAL LAW—Continued

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EVIDENCE—Continued

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SCHEDULE FOR HEARING APPEALS DURING 2018
NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks in 2018:

January 8 and 22

February 5 and 19

March 5 and 19

April 2, 16 and 30

May 14

June 4

July None

August 6 and 20

September 3 and 17

October 1, 15 and 29

November 12 and 26

December 10

Opinions will be filed on the first and third Tuesdays of each month.

DAVIS v. DAVIS

[250 N.C. App. 185 (2016)]

MELVIN L. DAVIS, JR. AND J. REX DAVIS, PLAINTIFFS

v.

DOROTHY C. DAVIS AND MKR DEVELOPMENT, LLC,
A VIRGINIA LIMITED LIABILITY COMPANY, DEFENDANTS

No. COA16-400

Filed 1 November 2016

Deeds—beach property—unreasonable restraint on alienation of life estate

The trial court did not err in a family dispute over beach property by granting summary judgment in favor of defendant mother. The deed language preventing the mother from renting out the property during her life tenancy created an unreasonable restraint on the alienation of defendant's life estate and was therefore void.

Appeal by Plaintiffs from judgment entered 21 October 2015 by Judge Gregory P. McGuire in Dare County Superior Court. Heard in the Court of Appeals 20 September 2016.

Williams Mullen, by Camden R. Webb and Elizabeth C. Stone, for the Plaintiffs-Appellants.

Vandeventer Black LLP, by Ashley P. Holmes and Norman W. Shearin, and LeClairRyan, by Thomas M. Wolf and Gretchen C. Byrd, for Defendant-Appellee.

DILLON, Judge.

This matter involves a family dispute over a beach property in Dare County (the "Property"). Defendant Dorothy C. Davis owns a life estate in the Property. The remainder interest is held by nominal Defendant MKR Development, LLC (the "LLC"), a limited liability company owned by and benefitting three of Mrs. Davis's children – Kaye Davis and Plaintiffs Melvin L. Davis, Jr., ("Mel") and J. Rex Davis ("Rex"). Plaintiffs commenced this suit to enjoin Mrs. Davis from renting the Property during her lifetime to vacationers, contending that certain language in the deed conveying Mrs. Davis her life estate interest (the "Deed") restricts her from renting out the Property.

This matter was designated a mandatory complex business case by Chief Justice of our Supreme Court Mark D. Martin and assigned to

DAVIS v. DAVIS

[250 N.C. App. 185 (2016)]

Judge Gregory P. McGuire, a Special Superior Court Judge for Complex Business Cases.

The parties filed cross motions for summary judgment. Judge McGuire granted Mrs. Davis summary judgment, holding that the restrictive language in the Deed - to the extent that it could be construed to restrict Mrs. Davis's ability to rent the Property - was void. We affirm Judge McGuire's order.

I. Background¹

Sometime in the 1980s, Mrs. Davis and her husband ("Mr. Davis") purchased the Property. In order to help pay for Property expenses, Mr. and Mrs. Davis occasionally rented the Property to vacationers through a real estate agency.

In 2009, Mr. and Mrs. Davis decided to transfer a remainder interest in the Property to three of their children (including Plaintiffs). Accordingly, Mr. and Mrs. Davis executed the Deed and conveyed a remainder interest in the Property to the LLC, reserving for themselves (Mr. and Mrs. Davis) a life estate.²

In July 2012, Mr. Davis died, leaving Mrs. Davis as the Property's sole life tenant. Less than two weeks later, Plaintiffs prepared a letter advising their mother that the Deed required that the Property "remain available for [her] personal use and [could] not be used to provide income to [her]."

Notwithstanding this letter, Mrs. Davis entered into an agreement with a real estate agency in 2013 to rent the Property to vacationers, just as she and her husband had done in years past.

In July 2013, Plaintiffs filed this declaratory judgment action to enjoin their mother from renting the Property without the express permission of the LLC.

In May 2015, both parties filed summary judgment motions. Judge McGuire granted Mrs. Davis's summary judgment motion. Plaintiffs timely appealed.

1. Judge McGuire's order contains a more comprehensive factual background and can be found at *Davis v. Davis*, No. 13 CVS 288, 2015 WL 6180969 (N.C. Super. Oct. 21, 2015).

2. Mr. and Mrs. Davis's other child Tommy had no role in LLC. In lieu of granting Tommy a position or interest in LLC, Mr. and Mrs. Davis instead paid off a debt secured by Tommy's home.

DAVIS v. DAVIS

[250 N.C. App. 185 (2016)]

II. Analysis

On appeal, Plaintiffs argue that the Deed contains a restriction which prevents their mother from renting out the Property during her life tenancy. Specifically, they point to the following language in the Deed:

The Grantors [Mr. and Mrs. Davis] hereby reserve unto themselves, a life estate in the Property, said life estate to be personal to the use of the Grantors, or the survivor thereof, and may not be utilized by any other person, nor may it be reduced to a cash value for the benefit of the Grantors, or the survivor thereof, but must remain always during the lifetime of said Grantors, or the survivor thereof, available for their individual and personal use without interference from either the remaindermen or any other person.

We disagree. We hold that the Deed language creates an unreasonable restraint on the alienation of Mrs. Davis's life estate and is therefore void. Accordingly, we affirm Judge McGuire's summary judgment order.

Restraints on alienation are generally disfavored in North Carolina due to the "necessity of maintaining a society controlled primarily by its living members and the desirability of facilitating the utilization of wealth." *Smith v. Mitchell*, 301 N.C. 58, 62, 269 S.E.2d 608, 611 (1980). Nevertheless, it is fundamentally important that a property owner "should be able to convey [property] subject to whatever condition he or she may desire to impose on the conveyance." *Id.*

To balance these competing policy interests, our Supreme Court has held that any *unlimited* restraint on alienation "is *per se* invalid." *Id.* However, restrictions which "provide only that someone's estate may be forfeited or be terminated if he alienates, or that provides damages must be paid if he alienates, may be upheld *if reasonable*." *Id.* (emphasis added). That is, our courts will generally uphold any reasonable restraints on alienation except unlimited restraints, which are *per se* unreasonable.

Our Supreme Court has applied this restraints doctrine to life estates. *Lee v. Oates*, 171 N.C. 717, 721, 88 S.E. 889, 891 (1916). ("[T]his Court has for many years consistently held that the doctrine as to restraints of alienation applies as well to estates for life as to estates in fee simple[.]"). See also *Crockett v. First Fed. Sav. & Loan Assoc. of Charlotte*, 289 N.C. 620, 624, 224 S.E.2d 580, 583 (1976) (reaffirming case-law that applies restraints doctrine to life estates); *Pilley v. Sullivan*,

DAVIS v. DAVIS

[250 N.C. App. 185 (2016)]

182 N.C. 493, 496, 109 S.E. 359, 360 (1921) (“The clause which purports to ingraft upon the devise an unlimited restraint on alienation is not only repugnant to the [life] estate devised, but is in contravention of public policy, and therefore void.”); *Wool v. Fleetwood*, 136 N.C. 460, 465-66, 48 S.E. 785, 787 (1904) (voiding a will provision prohibiting the life tenant from selling the life estate).

In the present case, Plaintiffs concede that the Deed creates an unlimited restraint on Mrs. Davis’s ability to alienate her life estate. Indeed, as noted in the summary judgment order, “[P]laintiffs contend that not only is [Mrs. Davis] prohibited from selling the life estate, she cannot rent or even permit others to use the Property.” To justify this position, Plaintiffs aver that the caselaw prohibiting unlimited restraints does not apply as Mrs. Davis is *both* the grantor who created the restraint *and* the life tenant who is subject to the restraint. Plaintiffs contend that *Lee* is distinguishable as the restraint at issue attached to a conveyance between a grantor and a life tenant, whereas here, Mrs. Davis reserved a life estate for *herself* and therefore *voluntarily* restricted that interest.

We hold that whether the life estate was created by conveyance by a third party or by reservation by the life tenant herself is irrelevant. An unlimited restraint is *against public policy*; it makes no difference if the restraint is self-imposed. Plaintiffs have failed to cite precedent, either from North Carolina or from another jurisdiction, that would recognize this distinction. Indeed, the adverse party in *Lee* argued that the conveyance restraint should nonetheless be upheld as the life tenant *herself* signed the deed, “thereby agree[ing] . . . not to alien her estate[.]” *Lee*, 171 N.C. at 724, 88 S.E. at 892. Our Supreme Court, however, rejected this argument, holding that an otherwise invalid restraint on alienation is not validated merely because the life tenant assented to the restraint by signing the instrument: “[To conclude otherwise] would enforce a restriction by estoppel[,] which the law declares void. The covenant was a ‘dead letter’ when it was entered into, and we do not think it can be vitalized in this way.” *Id.* Based on our Supreme Court’s reasoning in *Lee*, we conclude that the restraint on Mrs. Davis’s ability to rent her Property is *per se* void even though Mrs. Davis was also the person who created the restraint. We therefore affirm Judge McGuire’s order granting summary judgment to Mrs. Davis.

AFFIRMED.

Judges BRYANT and STEPHENS concur.

HEDDEN v. ISBELL

[250 N.C. App. 189 (2016)]

SUSAN HEDDEN, PLAINTIFF

v.

ANN ISBELL, DEFENDANT

No. COA16-406

Filed 1 November 2016

1. Appeal and Error—interlocutory orders and appeals—denial of motion to dismiss—personal jurisdiction—subject matter jurisdiction

Although a party challenging a trial court's order as to personal jurisdiction under Rule 12(b)(2) has the right of immediate appeal from an adverse ruling, the denial of a motion to dismiss pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction is not immediately appealable.

2. Jurisdiction—personal jurisdiction—personally served in North Carolina

The trial court did not err in an alienation of affections and criminal conversation case by denying defendant's motion to dismiss based on lack of personal jurisdiction. Defendant was personally served while physically present in North Carolina. The trial court acquired *in personam* jurisdiction over defendant and the need for a minimum contacts analysis was rendered unnecessary.

Appeal by defendant from order entered 17 December 2015 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 21 September 2016.

Steven Kropelnicki, PC, by Steven Kropelnicki, for plaintiff-appellee.

Morrow, Porter, Vermitsky, Fowler & Taylor PLLC, by John C. Vermitsky, for defendant-appellant.

ENOCHS, Judge.

Ann Isbell ("Defendant") appeals from the trial court's order denying her motion to dismiss for lack of personal jurisdiction pursuant to Rule 12(b)(2) of the North Carolina Rules of Civil Procedure and for failure to state a claim upon which relief can be granted under Rule 12(b)(6). After careful review, we affirm the trial court's order.

HEDDEN v. ISBELL

[250 N.C. App. 189 (2016)]

Factual Background

Plaintiff married Michael Hedden (“Hedden”) on 5 November 1977. Both Plaintiff and Hedden reside in Orange County, Florida. Defendant is a resident of Virginia.

In the Summer of 2014, Defendant and Hedden engaged in an extra-marital affair in Buncombe County, North Carolina. Among the various acts and conduct alleged to have occurred, was the assertion that “Plaintiff’s husband would drive to North Carolina to meet the Defendant for their sexual relations.”

Defendant was aware that Hedden was married to Plaintiff, however “actively participated in, initiated and encouraged conduct which resulted in the alienation of the genuine love and affection existing between Plaintiff and Plaintiff’s husband prior to the conduct of the Defendant.” On 3 February 2015, Plaintiff separated from Hedden as a result of his and Defendant’s adulterous relations.

On 2 June 2015, Plaintiff filed a verified complaint in Buncombe County Superior Court asserting claims for alienation of affection and criminal conversation against Defendant. On 15 June 2015, Defendant filed a motion to dismiss pursuant to Rules 12(b)(2) and (6). On 28 August 2015, Plaintiff was deposed.

A hearing was held on Defendant’s motion to dismiss before the Honorable Alan Z. Thornburg in Buncombe County Superior Court on 8 December 2015. At the hearing, for the first time, Defendant’s trial counsel stated that she would additionally be moving to dismiss Plaintiff’s complaint pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure.

On 17 December 2015, the trial court entered an order finding that “[Defendant] was served with process personally at on [sic] 3 June 2015 by a Buncombe County sheriff’s deputy at 1691 Pisgah Highway, Buncombe County, NC.” The trial court then concluded as a matter of law that “Defendant was served with process as provided by NCRCP Rule 4(j)(1),a [sic]” and that “[t]he court has grounds for jurisdiction under G.S. 1-75.4.” The court then ruled that “defendant’s motion to dismiss for lack of personal jurisdiction is hereby denied.” Defendant filed a timely notice of appeal of the trial court’s order on 28 December 2015.

HEDDEN v. ISBELL

[250 N.C. App. 189 (2016)]

Analysis

On appeal, Defendant argues that the trial court erred in denying her motion to dismiss pursuant to Rules (12)(b)(1) and (2).¹ Specifically, she contends that the trial court lacked subject matter jurisdiction over Plaintiff's claims because neither of the parties were North Carolina residents, and also lacked personal jurisdiction over Defendant because she did not have sufficient minimum contacts with North Carolina.

I. Appellate Jurisdiction

[1] Initially, we note that it is undisputed that the present appeal is interlocutory. "Generally, there is no right of immediate appeal from an interlocutory order." *Blue v. Mountaire Farms, Inc.*, ___ N.C. App. ___, 786 S.E.2d 393, 397 (2016).

Where a party challenges a trial court's order as to personal jurisdiction under Rule 12(b)(2), however, "[a]ny interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant or such party may preserve his exception for determination upon any subsequent appeal in the cause." N.C. Gen. Stat. § 1-277(b) (2015). "On the other hand, the denial of a motion to dismiss pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction is not immediately appealable." *Data Gen. Corp. v. Cnty. of Durham*, 143 N.C. App. 97, 100, 545 S.E.2d 243, 246 (2001).

"The distinction is important because the denial of a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) is not immediately appealable, but the denial of a motion challenging the jurisdiction of the court over the person of the defendant pursuant to Rule 12(b)(2) is immediately appealable."

Green v. Kearney, 203 N.C. App. 260, 264-65, 690 S.E.2d 755, 760 (2010) (internal brackets and ellipses omitted) (quoting *Zimmer v. N.C. Dep't of Transp.*, 87 N.C. App. 132, 133-34, 360 S.E.2d 115, 116 (1987)).

1. Defendant also moved to dismiss Plaintiff's complaint pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted. However, she does not contend that the trial court erred in failing to dismiss Plaintiff's claims on this ground on appeal. Consequently, any arguments regarding the trial court's ruling on Defendant's Rule 12(b)(6) motion are deemed abandoned. See N.C.R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

HEDDEN v. ISBELL

[250 N.C. App. 189 (2016)]

Therefore, to the extent Defendant argues that the trial court erred in denying her motion to dismiss under Rule 12(b)(1), that portion of her appeal is dismissed as interlocutory. We therefore only need to address the merits of Defendant's argument that the trial court lacked personal jurisdiction over her pursuant to Rule 12(b)(2). *See Hale v. Hale*, 73 N.C. App. 639, 640-41, 327 S.E.2d 252, 253 (1985) ("[N.C. Gen. Stat. § 1-277(b)] does not apply to orders denying motions made pursuant to . . . Rule 12(b)(1) seeking dismissal for lack of subject matter jurisdiction. Therefore, we need only decide whether our courts can properly assert personal jurisdiction over defendant." (internal citation omitted)).

II. Personal Jurisdiction

[2] Defendant asserts that the trial court erred in denying her motion to dismiss pursuant to Rule 12(b)(2). Specifically, she contends that she did not have sufficient minimum contacts with North Carolina for the trial court to exercise personal jurisdiction over her, thereby violating her due process rights under the Fourteenth Amendment of the United States Constitution. We disagree.

"When this Court reviews a decision as to personal jurisdiction, it considers only 'whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court.' " *Banc of Am. Secs. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 694, 611 S.E.2d 179, 183 (2005) (quoting *Replacements, Ltd. v. MidweSterling*, 133 N.C. App. 139, 140-41, 515 S.E.2d 46, 48 (1999)).

"The determination of whether jurisdiction is statutorily and constitutionally permissible due to contact with the forum is a question of fact." To resolve a question of personal jurisdiction, the court must engage in a two step analysis. First, the court must determine if the North Carolina long-arm statute's (N.C. Gen. Stat. § 1-75.4) requirements are met. If so, the court must then determine whether such an exercise of jurisdiction comports with due process.

Cooper v. Shealy, 140 N.C. App. 729, 732, 537 S.E.2d 854, 856 (2000) (quoting *Hiwassee Stables, Inc. v. Cunningham*, 135 N.C. App. 24, 27, 519 S.E.2d 317, 320 (1999)).

In the present case, Defendant was personally served with Plaintiff's complaint while she was physically present in the State of North Carolina in conformity with Rule 4(j)(1)(a) of the North Carolina Rules of Civil Procedure, which provides, in pertinent part, as follows:

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(j) **Process -- Manner of service to exercise personal jurisdiction.** -- In any action commenced in a court of this State having jurisdiction of the subject matter and grounds for personal jurisdiction as provided in G.S. 1-75.4, the manner of service of process within or without the State shall be as follows:

(1) **Natural Person.** -- Except as provided in subdivision (2) below, upon a natural person by one of the following:

a. By delivering a copy of the summons and of the complaint to the natural person . . .

This manner of service of process satisfies both requirements for establishing personal jurisdiction over Defendant. It is well established that

N.C.G.S. § 1-75.4(1)(a) allows the courts of this State to exercise *in personam* jurisdiction over a person served pursuant to Rule 4(j) or Rule 4(j1) of the North Carolina Rules of Civil Procedure “[i]n any action, whether the claim arises within or without this State, in which a claim is asserted against a party who when service of process is made upon such party . . . [i]s a natural person present within this State . . .”

Lockert v. Breedlove, 321 N.C. 66, 68, 361 S.E.2d 581, 583 (1987) (quoting N.C. Gen. Stat. § 1-75.4(1)(a) (1983)).

In *Lockert*, the defendant moved to dismiss the plaintiff’s claims on the ground that the trial court lacked personal jurisdiction over him because there were insufficient minimum contacts between him and North Carolina. *Id.* at 67, 361 S.E.2d at 582. The trial court denied his motion and this Court affirmed the trial court’s order. *Id.*

On appeal to our Supreme Court, the Court stated the following:

This Court has consistently applied the minimum contacts analysis articulated in *International Shoe [Co. v. Washington]*, 326 U.S. 310, 90 L. Ed. 95 (1945)] to cases in which nonresident defendants were served with process outside the forum state. *We conclude that such minimum contacts analysis is not necessary, however, when the defendant is personally served while present within the forum state.*

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Id. at 68, 361 S.E.2d at 583 (emphasis added) (internal citations omitted). Indeed, the Supreme Court went on to emphasize that

[t]he defendant would have us hold that the presence of a person in the forum state is not sufficient to confer jurisdiction upon its courts. We are aware that some courts have made sweeping pronouncements to the effect that minimum contacts analysis is required in all cases in which the defendant is a nonresident of the forum state. We conclude, however, that such cases are contrary to the Supreme Court's holdings in *International Shoe* and its progeny. We hold that the minimum contacts test is inapplicable to cases in which the defendant is personally served within the forum state.

Id. at 68-69, 361 S.E.2d at 583 (internal citations omitted). The Supreme Court concluded that "[f]or the foregoing reasons, we hold that the rule continues to be that personal service on a nonresident party, at a time when that party is present in the forum state, suffices *in and of itself* to confer personal jurisdiction over that party." *Id.* at 72, 361 S.E.2d at 585 (emphasis added).

We find that *Lockert* is controlling and dispositive as to the present appeal. Here, the trial court found that Defendant was personally served while physically present in the State of North Carolina. Indeed, this fact is undisputed by Defendant. Consequently, when the sheriff's deputy personally served her, the trial court acquired *in personam* jurisdiction over Defendant and the need for a minimum contacts analysis was rendered unnecessary. As a result, we affirm the trial court's order denying Defendant's motion to dismiss.²

Conclusion

For the reasons stated above, the trial court's order is affirmed.

AFFIRMED.

Judges ELMORE and ZACHARY concur.

2. We also note that Defendant makes a policy argument urging us to hold that service of process upon a nonresident defendant who is physically present in the State of North Carolina can no longer be deemed sufficient to confer personal jurisdiction upon trial courts and alternatively invites us moving forward to always require a minimum contacts analysis be performed in determining whether *in personam* jurisdiction exists. We decline Defendant's invitation to do so and, in any event, are bound by *Lockert's* holding in direct opposition to Defendant's position maintaining that "[t]he language of *International Shoe* did not sound a death knell for the transient rule of jurisdiction; rather, it set out an alternative means of establishing personal jurisdiction when the defendant is not present within the territory of the forum." *Id.* at 70, 361 S.E.2d at 584 (internal quotation marks omitted).

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IN THE MATTER OF J.R., A.R., K.R.

No. COA16-384

Filed 1 November 2016

**Child Abuse, Dependency, and Neglect—motion to proceed pro se
—likelihood of criminal charges and coercive influence**

Where the Rutherford County Department of Social Services filed juvenile petitions alleging that respondent-mother's children were abused, neglected, and dependent based on repeated physical abuse by respondent-mother's boyfriend, the trial court did not abuse its discretion by denying respondent-mother's requests to proceed pro se. The trial court was not required, either by statute or the Constitution, to allow respondent-mother to proceed pro se, and the trial court clearly considered her situation—including the likelihood of criminal charges and the boyfriend's coercive influence—in determining that self-representation was not in her best interest.

Appeal by respondent-mother from orders entered 4 January 2016 by Judge Randy Pool in District Court, Rutherford County. Heard in the Court of Appeals 10 October 2016.

Joshua G. Howell for petitioner-appellee Rutherford County Department of Social Services.

The Tanner Law Firm PLLC, by James E. Tanner III, for respondent-appellant mother.

Stephen M. Schoeberle for guardian ad litem.

STROUD, Judge.

Respondent-mother appeals from orders adjudicating her minor children “Joe,” “Amy,” and “Karl”¹ (collectively “the children”) abused and neglected juveniles. Respondent-mother argues that the trial court improperly denied her attempt to waive representation by counsel and represent herself. We affirm the orders.

On 18 June 2015, the Rutherford County Department of Social Services (“DSS”) filed juvenile petitions alleging that the children were

1. Pseudonyms are used to protect the identity of the minor children and for ease of reading.

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abused, neglected, and dependent. The petitions detailed significant and repeated physical abuse by respondent-mother's boyfriend ("the caretaker").² Whenever the caretaker was drunk, he would punch the children, hit them with wooden objects, or choke them. At the time the petition was filed, Joe and Karl had visible injuries. The petition alleged that respondent-mother did not stop the abuse because the caretaker hit her as well, and she was scared of him. The trial court placed the children in nonsecure custody with DSS the same day.

The matter was called for an adjudication hearing on 26 October 2015. Prior to the hearing, respondent-mother and the caretaker made a joint motion to dismiss their court-appointed counsel and represent themselves. The caretaker informed the court that respondent-mother had filed a complaint against her counsel with the North Carolina State Bar. Respondent-mother also told the court that she had not seen the discovery in the case, making it impossible for her to rebut DSS's case. The caretaker then stated, "[t]he base fact of it, Your Honor, is that we choose to represent ourselves." He continued:

She said that she was – we both said to our attorneys when we got them that – we give each other full disclosure to this case so that we can – because I've done a little bit of – I was pre-law in college, I ended up going into other things. But I was going to help her prepare, you know, to do research on the computer, look up statute 7B and get all the information.

We don't want these attorneys, your Honor. We shouldn't be stuck with them.

The trial court then denied both motions, stating, "I think you both need representation. You have adequate representation."

The hearing was not completed, and the case was continued until 9 November 2015. Prior to resuming the hearing, both the caretaker and respondent-mother's respective attorneys moved to withdraw from representation. Respondent-mother's attorney pointed out that she was respondent-mother's second attorney: "She had a prior attorney who then filed a motion to withdraw and then I was appointed I think it was in August. But she will not talk to me without her boyfriend [the caretaker], you know, being present. And that creates obviously some issues with us."

2. The caretaker was made a party to the adjudication due to the allegations made against him in the petition. *See* N.C. Gen. Stat. § 7B-401.1 (e) (2015).

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In addition, the caretaker and respondent-mother each presented the court with signed waivers of their right to counsel. Respondent-mother addressed the court as follows:

Yes. Well, I had asked when we began this in October that I could waive my right to counsel because that's what I was told by Steve up in your clerk's office.

You said that I needed this attorney when I asked you for dismissal of my attorney for a waive of right. You said no, that I needed that. And since then I've found the North Carolina Statute 7B-1101.1(a), please see case number In the Matter of JKP, Court of Appeals 14-756, citation number 767 S.E.2d 119 (2014).

For the record, Your Honor, I believe that my right was overridden by your statement and we had to proceed at that time. I ask for a dismissal of counsel, I waive my right to him. I don't want him to represent me or speak for me.

The court again denied both motions from the bench:

The motions of [the caretaker] and the respondent mother to be relieved -- have their counsel relieved and to be allowed to proceed representing themselves, self representation, is denied.

The Court would make findings of fact the allegations in this case of abuse and neglect involve allegations of serious assault on the children that could and may very well give rise to criminal proceedings being brought against one or both of these individuals -- the respondent mother and [the caretaker].

That if they were allowed to proceed without counsel, they may choose to testify themselves, which they have the right to do if they wish to, and any statements that they make could be used against them in criminal prosecution.

And they do have the right, of course, the rights associated with any kind of criminal prosecution including rights to remain silent if they wish to exercise those.

But pursuant to the statute the Court would find that the respondents have asked that they be allowed to represent themselves and that their attorneys be released. And the Court -- if the Court finds the person -- 7B-602(a)(1)

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states a parent qualifying for appointed counsel may be permitted to proceed without the assistance of counsel only after the Court examines the parent and makes findings of fact sufficient to show that the waiver is knowing and voluntary. The Court's examination shall be reported as provided in 7B-806.

The Court would find that the parents have made a request to be allowed to proceed on their own without counsel and be self represented. The Court would find that with pending criminal charges possible and maybe even likely that it would not be in their best interest to proceed without counsel.

And the Court would find that there would not be a knowing and voluntary waiver since they're not attorneys and are lay people and would not fully understand even the Court's directive as to what their rights may or may not be if they're proceeding representing themselves.

So, the Court will deny the request to release counsel.

The hearing then continued with both respondent-mother and the caretaker represented by their respective counsel.

On 4 January 2016, the trial court entered orders concluding that the children were abused and neglected. The court left the children in the custody of DSS, removed the caretaker as a party to the case, relieved DSS of its obligation to pursue reunification efforts with respondent-mother, and denied respondent-mother visitation. Respondent-mother filed a timely notice of appeal.³

Respondent-mother argues that the trial court erred by denying her request to waive counsel and represent herself. We disagree.

N.C. Gen. Stat. § 7B-602(a) provides that “[i]n cases where the juvenile petition alleges that a juvenile is abused, neglected, or dependent, the parent has the right to counsel and to appointed counsel in cases of indigency unless that person waives the right.” N.C. Gen. Stat. § 7B-602(a) (2015). The statute further provides that “[a] parent qualifying for appointed counsel may be permitted to proceed without the assistance of counsel only after the court examines the parent and makes findings of fact sufficient to show that the waiver is knowing and voluntary.”

3. The trial court permitted respondent-mother's counsel to withdraw on 10 December 2015, and respondent-mother filed the notice of appeal *pro se*.

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N.C. Gen. Stat. § 7B-602(a1). Respondent-mother contends that these statutory provisions create both a right to counsel and a “correlative . . . right to self-representation.” According to respondent-mother, when a parent asserts his or her right to self-representation, the trial court is required to examine the parent and also required to allow the parent to proceed *pro se* so long as the record reflects that the parent “was literate and competent, that she understood the consequences of the waiver, and that such waiver was a voluntary exercise of her own free will.”

But respondent-mother’s interpretation cannot be reconciled with the plain language of N.C. Gen. Stat. § 7B-602(a1). That subsection clearly states that the trial court *may* allow the parent to proceed *pro se*, and it is well established that the use of the word “may” in a statute implies the use of discretion. *See In re Hardy*, 294 N.C. 90, 97, 240 S.E.2d 367, 372 (1978) (“Ordinarily when the word ‘may’ is used in a statute, it will be construed as permissive and not mandatory.”). The discretionary nature of the trial court’s decision is further supported by the history of Chapter 7B. Prior to 1 July 1998, adjudication hearings in abuse, neglect, and dependency cases were governed by N.C. Gen. Stat. § 7A-631, which stated:

“The adjudicatory hearing shall be a judicial process designed to adjudicate the existence or nonexistence of any of the conditions alleged in a petition. In the adjudicatory hearing, the judge shall protect the following rights of the juvenile and his parent to assure due process of law: the right to written notice of the facts alleged in the petition, the right to counsel, the right to confront and cross-examine witnesses, the privilege against self-incrimination, the right of discovery and all rights afforded adult offenders except the right to bail, *the right of self-representation*, and the right of trial by jury.”

Thrift v. Buncombe County DSS, 137 N.C. App. 559, 561, 528 S.E.2d 394, 395 (2000) (quoting N.C. Gen. Stat. § 7A-631) (emphasis added). This statute was repealed, *see* 1998 N.C. Sess. Laws ch. 202, § 5, and replaced by N.C. Gen. Stat. § 7B-802, which provides: “The adjudicatory hearing shall be a judicial process designed to adjudicate the existence or nonexistence of any of the conditions alleged in a petition. In the adjudicatory hearing, the court shall protect the rights of the juvenile and the juvenile’s parent to assure due process of law.” N.C. Gen. Stat. § 7B-802 (2015). This Court previously concluded that the removal of the reference to the “privilege against self-incrimination” defeated a respondent’s contention that the privilege was protected by the statute.

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In re Pittman, 149 N.C. App. 756, 761, 561 S.E.2d 560, 565 (2002). Using that same logic, by removing the language specifically requiring the trial court to protect the right of self-representation, the General Assembly also eliminated any statutory right to self-representation. Thus, we conclude that, contrary to respondent-mother's argument, N.C. Gen. Stat. § 7B-602(a1) does not require the trial court to allow parents to waive counsel and represent themselves, but rather gives the court the *discretion* to do so.

Respondent-mother also asserts that she has a right to self-representation protected by the Sixth Amendment of the United States Constitution and Article I, Section 23 of the North Carolina Constitution, but the only cases cited by respondent-mother in support of her assertion discuss the right to self-representation in *criminal* cases.⁴ Respondent-mother cites no cases, and we have found none, that suggest a parent has a constitutional right to self-representation in the context of an abuse, neglect, and dependency proceeding. In *In re Lassiter*, 43 N.C. App. 525, 259 S.E.2d 336 (1979), this Court held that parents do not have a constitutional right to counsel in termination proceedings:

The termination of parental rights by the State invokes no criminal sanctions against the parent whose rights are so terminated. While this State action does invade a protected area of individual privacy, the invasion is not so serious or unreasonable as to compel us to hold that appointment of counsel for indigent parents is constitutionally mandated.

Id. at 527, 259 S.E.2d at 337. That decision was appealed to the United States Supreme Court, which left “the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings” for the trial court and held that “the trial court did not err in failing to appoint counsel for Ms. Lassiter.” *Lassiter v. Department of Social Services*, 452 U.S. 18, 32, 33, 68 L. Ed. 2d 640, 652, 653 (1981). Since there is no per se constitutional right to counsel for parents, there can be no correlative constitutional right to self-representation. Indeed, the few courts in other jurisdictions that have considered the question of a parent's right to self-representation have concluded that such a right

4. Respondent-mother cites *In re J.K.P.*, 238 N.C. App. 334, 336, 767 S.E.2d 119, 121 (2014), *disc. review denied*, __ N.C. __, 771 S.E.2d 314 (2015), in an attempt to support her argument, but that case dealt with whether the trial court properly allowed the respondent to proceed *pro se* in a termination proceeding in accordance with N.C. Gen. Stat. § 7B-1101.1 (a1) (2015), the companion statute to N.C. Gen. Stat. § 7B-602(a1). The *J.K.P.* Court never asserted there was a constitutional or statutory right to self-representation.

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does not exist under the United States Constitution. See *In re A.H.L., III*, 214 S.W.3d 45, 52 (Tex. App. 2006) (“We likewise find that a right of self-representation is not a necessary component of a fair parental rights termination proceeding.”); *In re Angel W.*, 113 Cal. Rptr. 2d 659, 665 (Cal. Ct. App. 2001) (“The Sixth Amendment does not apply in dependency proceedings so its structure cannot provide a basis for finding a correlative constitutional right of self-representation.”). But see *Dane Cnty. Dep’t of Human Servs. v. Susan P.S. (In re Sophia S.)*, 715 N.W.2d 692, 697 (Wis. Ct. App. 2006) (concluding that parents in termination proceedings have a right to self-representation under a provision of the Wisconsin Constitution which states that “[i]n any court of this state, any suitor may prosecute or defend his suit either in his own proper person or by an attorney of the suitor’s choice.” (quoting Wis. Const. art. I, § 21(2))). We find the reasoning of these cases persuasive and similarly conclude that there is no constitutional right to self-representation for a parent in an abuse, neglect, and dependency proceeding.

Having determined that the trial court was not required, either by statute or the Constitution, to allow respondent-mother to proceed *pro se*, we must still consider whether the court abused its discretion by denying respondent-mother’s request. “Absent an abuse of discretion, we will not disturb the trial court’s choice. An abuse of discretion occurs when the trial court’s ruling is so arbitrary that it could not have been the result of a reasoned decision.” *In re Robinson*, 151 N.C. App. 733, 737, 567 S.E.2d 227, 229 (2002) (citations and quotation marks omitted). In this case, the court considered respondent-mother and the caretaker’s motions to proceed *pro se* twice, once prior to the beginning of the hearing and a second time prior to the presentation of evidence on the second day of the hearing. The trial court denied the first motion by stating, “I think you both need representation. You have adequate representation.” After the second motion, the trial court made more detailed findings in support of its decision. Specifically, the court found that respondent-mother was potentially facing criminal charges due to the abuse suffered by her children and that she would be unlikely to be able to protect her rights with regard to those criminal charges if she represented herself.

In addition, although the trial court did not explicitly say so, it is clear from the transcript that the court found respondent-mother’s waiver was not knowing and voluntary because she was highly influenced – if not coerced – by the caretaker, with whom she continued to live and whom the trial court determined was physically abusive to the juveniles as well as respondent-mother. Respondent-mother’s attorney

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pointed out to the court that respondent-mother would not speak with him “without her boyfriend . . . being present. And that creates obviously some issues with us.” Each time the waiver was brought up in court, the caretaker argued first as to why the court should grant both his request *and* respondent-mother’s request to waive their right to a court-appointed attorney. The caretaker often spoke on behalf of both himself and respondent-mother, constantly using the pronoun “we.” He noted, for example, that respondent mother filed a grievance against one of her prior attorneys where she wrote “six to seven pages of narrative . . . about reasons why she does not want to be represented by this man.” Respondent-mother then followed the caretaker each time he brought up their request to waive the right to an attorney, making nearly identical arguments for waiving her right.

The trial court also had evidence of the extent of the caretaker’s control over respondent-mother from her own submissions to the trial court. Respondent mother filed a long written statement with the trial court in which she described her history with her husband and the father of the juveniles, whom she alleges was physically abusive and addicted to alcohol and drugs. They and their extended families lived in the state of Washington. They separated in about 2012, and she claims that she had been attempting to legally divorce him ever since but had been unable to because she could not find him to serve him.⁵ Apparently at about the same time as the separation from her husband, she met the caretaker and shortly after, alleging fear for the children’s safety, she decided to have the caretaker home-school three of her children. She, the caretaker, and the children then moved to North Carolina in 2013 to assist the caretaker’s ailing father. She had become estranged from her parents and extended family in Washington. She repeatedly states her fervent desire to marry the caretaker, noting that “[e]ver since we first started texting scripture over 3 and a half years ago, he has been my best friend, my Love, and my strength in all situations.” She describes how poorly behaved the children have been; explains away each of their injuries from the alleged physical abuse; and laments their lack of appreciation for being provided with “3+ meals a day, movies on the weekends, sweets once a week (only because they blew that themselves), time to ‘play’, and to enjoy living on top of a hill . . . in a beautiful home!” Of course, the children were also required to help maintain the “over 30 acres of [caretaker’s] family land that needs attending to[.]” She

5. DSS did find and serve respondent-father in this case and he participated in the case to some extent, although he is not a party to this appeal.

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notes that since the children pay no bills, it is “more than reasonable for them to live the life of a farmer, and to work hard.”

Considering respondent-mother’s written statements as well as the statements and behavior of both her and the caretaker in court, it is apparent that respondent-mother was entirely under the control of caretaker and incapable of understanding the effect his behavior has had on her children. The court’s findings from the bench reflect that it considered respondent-mother’s situation and determined that self-representation was not in her best interests. We cannot say that this ruling was “so arbitrary that it could not have been the result of a reasoned decision,” and accordingly, we do not disturb it. The adjudication and disposition orders are affirmed.

AFFIRMED.

Judges CALABRIA and INMAN concur.

JAMESTOWN PENDER, L.P., PLAINTIFF

v.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION AND WILMINGTON
URBAN AREA METROPOLITAN PLANNING ORGANIZATION, DEFENDANTS

No. COA15-925

Filed 1 November 2016

1. Appeal and Error—interlocutory orders and appeals—denial of motion to dismiss—no substantial right—certified order

Defendants’ appeal from the denial of their motions to dismiss were from interlocutory orders and dismissed for failure to demonstrate the existence of a substantial right. However, the trial court’s certified order on plaintiff’s motion for partial judgment on the pleadings was immediately appealable.

2. Indemnity—motion for partial judgment on pleadings—taking of property

The trial court did not err by granting plaintiff’s motion for partial judgment on the pleadings. Based upon the pleadings and the precedent established in *Kirby I* and *Kirby II*, plaintiff’s complaint and defendants’ answers established that a taking had occurred.

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Appeal by defendants from orders entered 28 January 2015 by Judge Jay D. Hockenbury and 22 April 2015 by Judge Gary E. Trawick in Pender County Superior Court. Heard in the Court of Appeals 10 February 2016.

Ward and Smith, P.A., by Ryal W. Tayloe, Alexander C. Dale, and Jeremy M. Wilson, and Hendrick Bryant Nerhood & Otis, LLP, by Matthew H. Bryant, for plaintiff-appellee.

Attorney General Roy Cooper, by Special Deputy Attorney General James M. Stanley, Jr., for defendant-appellant North Carolina Department of Transportation.

Shanklin & Nichols, LLP, by Kenneth A. Shanklin, and Smith Moore Leatherwood LLP, by Matthew A. Nichols and James “Jay” R. Holland, for defendant-appellant Wilmington Urban Area Metropolitan Planning Organization.

CALABRIA, Judge.

Jamestown Pender, L.P. (“plaintiff”) brought the underlying action against the North Carolina Department of Transportation (“NCDOT”) and Wilmington Urban Area Metropolitan Planning Organization (“WMPO”) (collectively, “defendants”) concerning the putative taking of plaintiff’s property. The trial court denied defendants’ motions to dismiss, and entered an order granting partial judgment on the pleadings, finding that the recording of a transportation corridor official map for the Hampstead Bypass pursuant to the Transportation Corridor Official Map Act, N.C. Gen. Stat. § 136-44.50 *et seq.* (“the Map Act”), by WMPO constituted a taking of plaintiff’s property. Defendants appeal.

I. Factual and Procedural Background

The Map Act authorizes several entities, including NCDOT and WMPO, to file a “transportation corridor official map” with a county’s register of deeds, creating a protected corridor in the future location of a planned roadway project. N.C. Gen. Stat. § 136-44.50 (2015). Filing the map effectuates restrictions on the demarcated land, so that “no building permit shall be issued for any building or structure or part hereof located within the transportation corridor, nor shall approval of a subdivision, as defined in G.S. 153A-335 and G.S. 160A-376, be granted with respect to property within the transportation corridor.” N.C. Gen. Stat. § 136-44.51(a). Pursuant to the Map Act, as it stood during the time in which the events of this case transpired, these restrictions were to last

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“for an indefinite period of time.” *Kirby v. N.C. Dep’t of Transp.*, ___ N.C. ___, ___, 786 S.E.2d 919, 921 (2016) (citing N.C. Gen. Stat. § 136-44.51). After the map is filed, NCDOT is not obligated to build or complete the highway project. *Id.*

In November of 2011, WMPO filed a transportation corridor official map. Plaintiff, a Delaware limited partnership, owned property which fell within the boundary of the transportation corridor. Prior to 2011, plaintiff was in the process of developing the property as a mixed-use commercial and residential development. Plaintiff sought administrative remedies, the adequacy and futility of which were a subject of dispute.

On 27 June 2014, plaintiff brought the underlying action against defendants in Pender County Superior Court. Plaintiff’s complaint alleged inverse condemnation, unconstitutional taking, negative easement, violations of substantive and procedural due process, and violations of equal protection, and sought a declaratory judgment requiring defendants to compensate plaintiff for the taking of property and holding the Map Act unconstitutional.¹

On 3 September 2014, NCDOT filed an answer, motion to dismiss, and motion for hearing. Its motion to dismiss was made pursuant to Rules 12(b)(1), (2), and (6) of the North Carolina Rules of Civil Procedure, based upon failure to state a claim upon which relief can be granted, lack of jurisdiction, sovereign and official immunities, N.C. Gen. Stat. § 136-111, lack of standing and ripeness, statutes of limitation and repose, failure to exhaust administrative remedies, and failure to join necessary parties. On 30 September 2014, WMPO filed a motion to dismiss pursuant Rules 12(b)(1) and (6) of the North Carolina Rules of Civil Procedure, alleging failure to exhaust administrative remedies, lack of standing, lack of subject matter jurisdiction, and failure to state a claim. These motions were heard on 17 December 2014, at which time the trial court, in open court, denied them in part and granted them in part. On 7 January 2015, WMPO filed an answer to the complaint. On 14 January 2015, WMPO gave notice of appeal from the trial court’s oral partial denial of its motion to dismiss.

On 28 January 2015, the trial court entered a written order on defendants’ motions to dismiss. The trial court allowed dismissal of plaintiff’s

1. Plaintiff sought no remedy against WMPO except to have WMPO bound by the judgment. Plaintiff explicitly noted in its complaint that “No monetary relief is sought from WMPO in this action. WMPO is named as a nominal party for notice purposes as a result of its recording of . . . that certain Transportation Corridor Official Map . . . as more fully described herein.”

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equal protection claims for failure to state a claim, and plaintiff's second and third claims for being duplicative, and denied the remainder of defendants' motions. On 5 February 2015, NCDOT gave notice of appeal. On 10 February 2015, WMPO gave supplemental notice of appeal.

On 17 February 2015, this Court entered its unanimous opinion in the case of *Kirby v. N.C. Dep't. of Transp.*, ___ N.C. App. ___, 769 S.E.2d 218 (2015) (hereinafter *Kirby I*), *aff'd*, ___ N.C. ___, 786 S.E.2d 919 (2016). In *Kirby I*, this Court considered a similar action against NCDOT, alleging a taking pursuant to the Map Act, in which the trial court granted NCDOT's motion to dismiss plaintiffs' complaints. This Court reversed and remanded the matter for consideration of the damages suffered by plaintiffs, and declined to address several of the issues raised. *Id.* at ___, 769 S.E.2d at 236.

On 23 February 2015, plaintiff moved for partial judgment on the pleadings, seeking that the trial court determine that NCDOT executed a taking of plaintiff's property pursuant its power of eminent domain, and that the trial court order a jury trial on the issue of compensation. On 22 April 2015, the trial court entered an order on this motion. This order cited *Kirby I* as part of its reasoning. In its order, the trial court held that WMPO was acting as an agent of NCDOT, that NCDOT had appealed *Kirby* to the Supreme Court of North Carolina, and that a determination of the facts in the instant case would better be delayed until after the Supreme Court's decision in *Kirby*. The trial court declined to address the nature and extent of the taking of plaintiff's property, but allowed plaintiff's motion for partial judgment on the pleadings, holding that NCDOT had executed its power of eminent domain, that this constituted a taking and inverse condemnation of plaintiff's property, and that a jury trial would be scheduled to determine the amount of compensation due plaintiff. The trial court further certified this order for appeal to this Court pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure. Defendants gave notice of appeal.

From the trial court's order dated 28 January 2015, partially denying their motions to dismiss, and the trial court's order dated 22 April 2015, granting plaintiff's motion for partial judgment on the pleadings, defendants appeal.

On 10 June 2016, our Supreme Court issued its opinion in *Kirby*, affirming the decision of this Court. *Kirby v. N.C. Dep't. of Transp.*, ___ N.C. ___, 786 S.E.2d 919 (2016) (hereinafter *Kirby II*). On 11 July 2016, the North Carolina General Assembly approved House Bill 959 ("H.B. 959"). This bill, *inter alia*, rescinded all transportation corridor official

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maps filed pursuant to the Map Act, and imposed a moratorium on the filing of new maps, effective 1 July 2016 until 1 July 2017. N.C. Sess. Laws 2016-90 §§ 16, 17(a); *see also* N.C. Gen. Stat. § 136-44.50(h) (2016).

On 9 August 2016, this Court entered an order directing the parties to file supplemental briefs addressing the Supreme Court's decision in *Kirby II* and the impact of H.B. 959. All parties did so.

II. Interlocutory Appeal

[1] As a preliminary matter, we note that the instant appeal is from the partial grant of a motion to dismiss, and the grant of a partial motion for judgment on the pleadings. These orders, which do not dispose of the entirety of the case but leave matters for further action by the trial court, are interlocutory. *See Royal Oak Concerned Citizens Ass'n v. Brunswick Cty.*, 233 N.C. App. 145, 148, 756 S.E.2d 833, 835 (2014).

“Generally, there is no right of immediate appeal from interlocutory orders and judgments.” *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). “[W]hen an appeal is interlocutory, the appellant must include in its statement of grounds for appellate review ‘sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.’” *Johnson v. Lucas*, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338 (quoting N.C.R. App. P. 28(b)(4)), *aff'd per curiam*, 360 N.C. 53, 619 S.E.2d 502 (2005).

[I]mmediate appeal of interlocutory orders and judgments is available in at least two instances. First, immediate review is available when the trial court enters a final judgment as to one or more, but fewer than all, claims or parties and certifies there is no just reason for delay. . . . Second, immediate appeal is available from an interlocutory order or judgment which affects a substantial right.

Sharpe v. Worland, 351 N.C. 159, 161-62, 522 S.E.2d 577, 579 (1999) (citations omitted).

A. Motions to Dismiss

“An order . . . granting a motion to dismiss certain claims in an action, while leaving other claims in the action to go forward, is plainly an interlocutory order.” *Pratt v. Staton*, 147 N.C. App. 771, 773, 556 S.E.2d 621, 623 (2001). However, sovereign immunity raises a jurisdictional issue that is immediately appealable because it affects a substantial right. *Arrington v. Martinez*, 215 N.C. App. 252, 256, 716 S.E.2d 410, 413

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(2011). NCDOT asserts that its sovereign immunity insulates it from suit, and allows immediate appeal from the denial of its motion to dismiss.

We note, however, that NCDOT explicitly declined to pursue immunity at the hearing. The trial court found this fact in its order on the motions to dismiss. We hold, therefore, that because NCDOT waived its sovereign immunity, no jurisdictional issue exists that would affect a substantial right.

WMPO contends that the dismissal order impacts a substantial right, in that plaintiff failed to exhaust administrative remedies, and in that the denial of its motion subjected WMPO to legal liability for performing its governmental duties.

A plaintiff's failure to exhaust administrative remedies is grounds for dismissal because it deprives the court of subject matter jurisdiction. *Steward v. Green*, 189 N.C. App. 131, 133, 657 S.E.2d 719, 721 (2008). Thus, a motion to dismiss for failure to exhaust administrative remedies is equivalent to a motion to dismiss for lack of subject matter jurisdiction. However, "[a] trial judge's order denying a motion to dismiss for lack of subject matter jurisdiction is interlocutory and not immediately appealable." *Shaver v. N.C. Monroe Constr. Co.*, 54 N.C. App. 486, 487, 283 S.E.2d 526, 527 (1981). As such, an interlocutory appeal based on failure to exhaust administrative remedies is not immediately appealable.

Similarly, being subjected to legal liability is not a substantial right that is immediately appealable. "Avoidance of trial is not a substantial right entitling a party to immediate appellate review." *Anderson v. Atlantic Cas. Ins. Co.*, 134 N.C. App. 724, 727, 518 S.E.2d 786, 789 (1999). Additionally, the speculative threat of future trials does not qualify as a substantial right entitling a party to an immediate appeal. *Builders Mut. Ins. Co. v. Meeting St. Builders, LLC*, 222 N.C. App. 646, 651, 736 S.E.2d 197, 200 (2012). In the instant case, avoiding the current action is not a substantial right of WMPO, and concerns about the "potentially dozens of more" trials are mere speculation. Thus, this argument also fails to demonstrate that WMPO is entitled to immediate appeal.

Because neither NCDOT nor WMPO has demonstrated the existence of a substantial right with respect to the denial of their motions to dismiss, we hold that those motions are interlocutory, and dismiss this appeal with respect to those motions.

B. Partial Judgment on the Pleadings

"When the trial court certifies its order for immediate appeal under Rule 54(b), appellate review is mandatory. Nonetheless, the trial court

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may not, by certification, render its decree immediately appealable if [it] is not a final judgment.” *Sharpe*, 351 N.C. at 162, 522 S.E.2d at 579 (citations and quotations omitted). In the instant case, the trial court certified its order on plaintiff’s motion for partial judgment on the pleadings pursuant to Rule 54(b). Although the order leaves open the issue of damages, it is final with respect to defendants’ liability, and we therefore hold that this order, as certified, is immediately appealable.

III. Partial Judgment on the Pleadings

[2] In various arguments, defendants contend that the trial court erred in granting plaintiff’s motion for partial judgment on the pleadings. We disagree.

A. Standard of Review

This Court reviews a motion for judgment on the pleadings *de novo*. *Odell v. Legal Bucks, LLC*, 192 N.C. App. 298, 305, 665 S.E.2d 767, 772 (2008).

“In deciding [a motion for judgment on the pleadings], the trial court looks solely to the pleadings. The trial court can only consider facts properly pleaded and documents referred to or attached to the pleadings.” *N.C. Concrete Finishers v. N.C. Farm Bureau Mut. Ins. Co.*, 202 N.C. App. 334, 336, 688 S.E.2d 534, 535 (2010) (quoting *Reese v. Mecklenburg Cnty.*, 200 N.C. App. 491, 497, 685 S.E.2d 34, 37-38 (2009)). A judgment on the pleadings is properly entered only if “‘all the material allegations of fact are admitted[,] . . . only questions of law remain[,]’ and no question of fact is left for jury determination.” *Id.* (quoting *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974)).

B. Analysis

First, defendants contend that the trial court was divested of authority to rule on plaintiff’s motion for partial judgment on the pleadings after defendants filed their notices of appeal from the trial court’s order denying their motions to dismiss.

“As a general rule, once a party gives notice of appeal, such appeal divests the trial court of its jurisdiction, and the trial judge becomes *functus officio*.” *RPR & Assocs., Inc. v. Univ. of N.C.-Chapel Hill*, 153 N.C. App. 342, 346, 570 S.E.2d 510, 513 (2002). “Where a party appeals from a *nonappealable* interlocutory order, however, such appeal does not deprive the trial court of jurisdiction, and thus the court may properly proceed with the case.” *Id.* at 347, 570 S.E.2d at 514. As we have held, above, that defendants’ appeals from the trial court’s denial of their

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motions to dismiss were interlocutory, those appeals did not divest the trial court of its jurisdiction. We hold that the trial court had jurisdiction to hear plaintiff's motion for partial judgment on the pleadings.

Defendants next raise several arguments challenging the merits of plaintiff's motion for partial judgment on the pleadings, and the trial court's reliance upon *Kirby I* in reaching its decision. Ultimately, these arguments can be condensed to a single issue: whether the trial court erred in granting plaintiff's motion for partial judgment on the pleadings.

In its complaint, plaintiff alleged, *inter alia*, the following relevant facts:

20. For all purposes under the Act, WMPO acts on behalf of NCDOT and is an agent of NCDOT.
21. The Hampstead Bypass is an NCDOT project.
22. The Map was filed with the coordination, oversight, and approval of NCDOT.
23. WMPO does not have the power of eminent domain.
24. The recorded documents for the Hampstead Bypass associated with the Map set forth the list of properties and property owners whose real property purportedly is located within the mapped protected corridor pursuant to N.C. Gen. Stat. § 136-44.51 ("Protected Corridor").
25. The Property is within the Protected Corridor.
26. The Map is cross-indexed under Jamestown's name in the Pender County Register of Deeds. Pender County tax maps also depict the route of the Hampstead Bypass across the Property.
27. The Hampstead Bypass has not been completed.
28. NCDOT plans to purchase or condemn properties located within the Hampstead Bypass in order to allow NCDOT to construct and develop the Hampstead Bypass.
29. Prior to the recording of the Map and at all times thereafter, NCDOT did not have, and has not had, the funds available to acquire the properties necessary for the Hampstead Bypass or for its construction.
30. Despite these plans to purchase or condemn the properties, NCDOT has informed Jamestown that it will be

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ten (10) years or more—perhaps thirty (30) years—before NCDOT actually purchases or condemns the properties.

...

31. The Property is located within the Hampstead Bypass project.

32. The Property is heavily impacted by the Hampstead Bypass.

33. The Hampstead Bypass, when developed, will divide the Property into two pieces. It also will result in the taking of all of that portion of the Property previously approved for commercial development.

In its answer to plaintiff's complaint, NCDOT denied allegations 20, 22, 29, and 30; in short, NCDOT denied that WMPO was its agent, that it had oversight over WMPO's filing, that it lacked the funds to acquire the property at issue, and that it would be ten or thirty years before NCDOT condemned or purchased the property. With respect to allegation 24, NCDOT contended that it did not draft or file the corridor map, and that it therefore lacked knowledge of the allegations. The remaining relevant allegations were admitted. More specifically, in its answer, NCDOT admitted the following:

31. It is admitted that a portion of Plaintiff's property lies within the protected corridor. Except as herein admitted, the remaining allegations are denied.

32. It is admitted that the proposed project is anticipated to impact plaintiff's property and areas that plaintiff's [sic] intended for commercial development. Plaintiff will be justly compensated once right of way acquisition authorization has been approved for the project. Except as herein admitted, the remaining allegations are denied.

33. It is admitted that the proposed project is anticipated to impact plaintiff's property and that Plaintiff will be justly compensated once right of way acquisition authorization has been approved for the project. Except as herein admitted, the remaining allegations are denied.

NCDOT made additional admissions, each acknowledging that "plaintiff will be justly compensated for any taking of property rights[.]"

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In its answer to plaintiff's complaint, WMPO denied allegation 20, and alleged that it was without knowledge with respect to allegations 29 and 30. The remainder of the relevant allegations were admitted.

At a minimum, defendants admitted that plaintiff's property was within the transportation corridor, and that plaintiff's property would be impacted as a result. NCDOT explicitly admitted that plaintiff should and would be compensated for any taking that occurred. Given that the material facts were admitted, the only question remaining was one of law, namely whether the impact on plaintiff's property constituted a taking, requiring defendants, or more specifically NCDOT, to compensate plaintiff.

Defendants contend that a taking did not occur. NCDOT alleges that this is due to the fact that WMPO, not NCDOT, filed the map at issue. However, NCDOT fails to offer statutory citations or other authority to explain why this precludes plaintiff from suffering a taking.

H.B. 959 contains language relevant to this issue. Specifically, it provides that:

Notwithstanding any provision of law to the contrary, damages, right-of-way costs, and planning and design costs related to litigation concerning the adoption of a transportation corridor official map under Article 2E of Chapter 136 of the General Statutes shall be paid from the tier under Article 14B of Chapter 136 of the General Statutes in which the project covered by the transportation corridor official map was funded under or is programmed to be funded under. For projects covered by a transportation corridor official map that were not funded, or are not programmed to be funded, under Article 14B of Chapter 136 of the General Statutes, damages, right-of-way costs, and planning and design costs related to litigation concerning the adoption of the transportation corridor official map shall be paid from the regional allocation of funds under Article 14B of Chapter 136 of the General Statutes for the region covered by the transportation corridor official map.

N.C. Sess. Laws 2016-90 § 15.

If the words of a statute "are clear and unambiguous, they are to be given their plain and ordinary meanings." *Savage v. Zelent*, ___ N.C. App. ___, ___, 777 S.E.2d 801, 804 (2015) (citations and quotations omitted). "Where the legislature has made no exceptions to the positive terms of

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a statute, the presumption is that it intended to make none, and it is a general rule of construction that the courts have no authority to create, and will not create, exceptions to the provisions of a statute not made by the act itself.” *Sara Lee Corp. v. Carter*, 351 N.C. 27, 36, 519 S.E.2d 308, 313 (1999) (quoting *Upchurch v. Hudson Funeral Home, Inc.*, 263 N.C. 560, 565, 140 S.E.2d 17, 21 (1965)).

In the instant case, the language of H.B. 959 is clear and unambiguous. H.B. 959 specifies that the costs resulting from litigation surrounding the filing of maps pursuant to the Map Act are to be paid from funds set up by NCDOT’s Transportation Investment Strategy Formula, N.C. Gen. Stat. § 136-189.11 (2015). Section 15 does not mention any distinctions between maps recorded by NCDOT and those recorded by other organizations in terms of liability. Rather, according to the “plain and ordinary meaning” of the statute, the costs associated with litigation over the filing of a map are paid by a predetermined fund, and exactly which fund is used to pay these costs is determined by which project is covered by the Map Act. *Savage*, ___ N.C. App. at ___, 777 S.E.2d at 804.

The General Assembly did not include an exception to this rule for maps recorded by agencies other than NCDOT, for sovereign immunity reasons or otherwise, so we must presume that the General Assembly did not intend for there to be such an exception. *Sara Lee Corp.*, 351 N.C. at 36, 519 S.E.2d at 313. Because we must carry out the General Assembly’s intent “to the fullest extent,” we cannot read such an exception into the statute. *Savage*, ___ N.C. App. at ___, 777 S.E.2d at 804. We decline to hold that NCDOT is exempt from liability simply on the basis of another agency filing the map.

NCDOT further contends that the trial court erred in relying on *Kirby I* to support the theory that a taking occurred, arguing that our holding in *Kirby I* did not in fact demonstrate a taking in contexts like this one.

In *Kirby I*, we held explicitly that “the Map Act empowers NCDOT with the right to exercise the State’s power of eminent domain to take private property of property owners affected by, and properly noticed of, a transportation corridor official map . . . which power, when exercised, requires the payment of just compensation.” *Kirby I*, ___ N.C. App. at ___, 769 S.E.2d at 232. We further held that, “[u]pon the filing with the register of deeds of a permanent, certified copy of the transportation corridor official map . . . the statutory restrictions of [the Map Act] are applicable to each ‘affected’ owner[.]” *Id.* at ___, 769 S.E.2d at 234. We concluded that NCDOT had not merely made plans to acquire

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property, but had exercised its power of eminent domain. *Id.* at ___, 769 S.E.2d at 235. While we noted that this determination required a fact-specific inquiry, we held that the demands of such an inquiry were met.

As an additional matter, we note that in *Kirby II*, our Supreme Court further held that “the Map Act restricted plaintiffs’ fundamental rights to improve, develop, and subdivide their property for an unlimited period of time. These restraints, coupled with their indefinite nature, constitute a taking of plaintiff’s elemental property rights by eminent domain.” *Kirby II*, ___ N.C. at ___, 786 S.E.2d at 921.

NCDOT contends that the trial court erred in relying upon *Kirby I* because that case did not involve a putative agency relationship, as is the case before us, but rather direct action by NCDOT. As we noted above, however, direct action by NCDOT is not required for a taking to occur under statute, requiring payment from funds set aside for that purpose. NCDOT further contends that liability for a taking requires a fact-specific inquiry into the values of properties and the degree of impact upon them. However, this matter is still before the trial court; plaintiff’s partial motion for judgment on the pleadings left open the degree to which a taking occurred, and the just compensation for the taking. The only issue disposed of was the legal question of *whether* a taking had occurred. NCDOT’s argument does not truly challenge that ruling.

We hold that, based upon the pleadings and the precedent established in *Kirby I* and *Kirby II*, plaintiff’s complaint and defendants’ answers established that a taking had occurred. The trial court did not err in granting plaintiff’s motion for partial judgment on the pleadings on that limited issue.

This argument is without merit.

IV. Conclusion

Because defendants fail to show that the denial of their motions to dismiss impacted a substantial right, those arguments are dismissed as interlocutory. Because the pleadings, taken as a whole and considering defendants’ admissions, demonstrated no genuine issue of whether a taking had occurred, the trial court did not err in granting plaintiff’s motion for partial judgment on the pleadings on that issue.

DISMISSED IN PART, AFFIRMED IN PART.

Judge TYSON concurs.

Judge DAVIS concurs in the result only.

SED HOLDINGS, LLC v. 3 STAR PROPS. LLC

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SED HOLDINGS, LLC, PLAINTIFF

v.

3 STAR PROPERTIES, LLC, JAMES JOHNSON, TMPS LLC, MARK HYLAND,
AND HOME SERVICING, LLC, DEFENDANTS

No. COA16-385

Filed 1 November 2016

Appeal and Error—interlocutory orders and appeals—appeal of injunction—contempt orders—jurisdiction

Given these particular facts and the procedural context in which the contempt orders were entered, the trial court acted reasonably in continuing to exercise jurisdiction over the case while defendants' appeal of the injunction was pending in the Court of Appeals. Because the injunction was ultimately upheld, the contempt orders entered to enforce it did not prejudice defendants.

Appeal by defendants from orders entered between 24 September 2015 and 5 January 2016 by Judge G. Wayne Abernathy in Durham County Superior Court. Heard in the Court of Appeals 21 September 2016.

Graebe Hanna & Sullivan, PLLC, by Douglas W. Hanna, for plaintiff-appellee.

Law Offices of Hayes Hofler, P.A., by R. Hayes Hofler, III, for defendants-appellants.

ZACHARY, Judge.

Generally, when a party gives notice of appeal from a trial court order, that appeal deprives the trial court of jurisdiction to proceed on any matter embraced by the challenged order. But this general rule is subject to exceptions, one of which applies in the instant case. Here, a preliminary injunction was granted against defendants, and they appealed that interlocutory order to this Court. While the appeal was pending, the trial court held contempt proceedings and entered several show cause orders to enforce the terms of its injunction. The trial court ultimately held defendants in civil contempt. After determining that the injunction was subject to immediate review, this Court held that the injunction order was properly entered. Defendants now appeal the entry of the contempt orders, and they argue that their notice of appeal from the injunction deprived the trial court of jurisdiction, rendering

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the contempt orders null and void. For the reasons that follow, we conclude that the trial court retained jurisdiction to enter contempt orders pending defendants' first appeal and, accordingly, we affirm the entry of those orders.

I. Background

The factual genesis of this case was the execution of a "Non-Performing Note and Mortgage Loan Sale Agreement" (Agreement) between plaintiff SED Holdings, LLC (SED) and defendant 3 Star Properties, LLC (3 Star). Both SED and 3 Star are in the business of buying and selling pools of residential mortgage loans. Defendant Mark Hyland (Hyland) is the managing member of defendant TMPS LLC (TMPS), a Texas-based limited liability company. 3 Star had previously purchased the loan pool at issue in this case from TMPS. Defendant James Johnson is a managing member of 3 Star, and he negotiated the terms of the Agreement with SED.

Pursuant to the Agreement, which was executed on 20 June 2014, SED agreed to purchase 1,235 mortgages—with a total outstanding value of \$71,180,364.00—from 3 Star for \$13,880,171.00. SED agreed to pay \$2,000,000.00¹ of the purchase price in cash at closing, and to pay the remaining principal balance of \$11,880,171.00 pursuant to the terms of a promissory note (the Note). A Security Agreement was also executed by the parties. The Agreement required SED to use the following third parties to hold, inspect, cure, and process the loans until the Note was paid off: (1) Brown and Associates, a Texas law firm, acted as custodian of the records; and (2) defendant Home Servicing, LLC (Home Servicing) was responsible for servicing the loan files. This requirement stemmed from Hyland and TMPS's pre-existing relationship with Brown & Associates and Home Servicing.

The Agreement also contained a "put back" provision that allowed SED to return to 3 Star any loan or asset that either suffered from an "incurable documentary defect" or was unsecured by a valid first mortgage. The put back provision had to be invoked within 45 days of closing. Critically, the Security Agreement provided that if SED defaulted on the terms of the sale, 3 Star had the right to take possession of all assets and attempt to sell them on behalf of SED.

Problems arose after SED inspected the mortgage pool in July 2014. According to SED, the entire deal rested on certain representations

1. \$300,000.00 of the initial payment was the earnest money deposit.

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made by Johnson and 3 Star, most notably that each mortgage was secured by real property and that 3 Star owned all loans contained in the pool. Taking the position that these representations were materially false, SED claimed that 3 Star owned only a few of the loans, many of which were unsecured and essentially worthless. SED attempted to return 605 loans for a refund, but 3 Star did not respond to the “put back” notice.

Instead, 3 Star claimed that SED had defaulted on the Agreement’s terms and had not made a good-faith attempt to sell the non-performing mortgages it acquired from 3 Star. As a result, 3 Star served SED with a notice of default on 17 October 2014 and expressed an intention to exercise its right to sell assets from the loan pool on behalf of SED. In response, SED filed a verified complaint² against defendants in Durham County Superior Court on 1 December 2014. The complaint alleged claims for, *inter alia*, breach of contract, fraud, negligent misrepresentation, and civil conspiracy, and also contained a motion asking for preliminary injunctive relief. Defendants then filed a motion to dismiss the complaint for lack of subject matter jurisdiction and improper venue based on a forum selection clause in the Security Agreement and a choice of law provision in the Agreement, which provided, respectively, that any actions would be filed in Harris County, Texas, and that Texas law would govern.

After the trial court heard defendants’ motion to dismiss and SED’s motion for injunctive relief, it entered two orders on 13 February 2015. One order denied defendants’ motion to dismiss, and the other order granted SED’s motion for injunctive relief. The injunction prohibited defendants from “selling . . . or otherwise making any dispositions of any of the loans sold to SED[,]” and it instructed defendants to place any monies they collected from transactions related to the loan sale in escrow pending the case’s resolution. SED was instructed to post a \$100,000.00 bond to protect and secure defendants’ rights. On 19 February 2015, defendants gave notice of appeal from both of the trial court’s orders. *See SED Holdings, LLC v. 3 Star Properties, LLC*, __ N.C. App. __, 784 S.E.2d 627 (2016) (“*SED I*”).

Although the denial of defendants’ motion to dismiss and the granting of SED’s motion for a preliminary injunction were interlocutory orders, this Court addressed the merits of defendants’ arguments concerning each order. *Id.* at __, 784 S.E.2d at 630-31. Because the preliminary injunction froze monies related to the mortgage pool sale, the

2. We note that the essence of the complaint was that defendants acted in concert to defraud SED under the Agreement.

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SED I Court held that it affected defendants' substantial "right to use and control [their] assets." *Id.* at __, 784 S.E.2d at 630. However, the trial court's injunction was ultimately upheld. *Id.* at __, 784 S.E.2d at 632. This Court's mandate in *SED I* was issued on 25 April 2016.

While the appeal in *SED I* was pending, the trial court conducted a series of contempt proceedings and issued several orders ("the contempt orders") between September 2015 and January 2016. Those proceedings were prompted by SED's motion to show cause why defendants should not be held in civil contempt for failure to comply with the injunction. SED's motion to show cause contained allegations that defendants had violated the injunction by selling loans related to the Agreement and disbursing funds that were required to be held in escrow. On 24 September 2015, the trial court entered an order that commanded defendants to show cause why they should not be held in civil contempt. The show cause order contained the following pertinent findings of fact:

12. On . . . 28 [July] 2015, SED sent an email to Home Servicing . . . requesting the following information on the assets: (1) Payoff date; (2) Next due date; (3) Acquired UPB; (4) Beginning UPB; and (5) Ending UPB. This information is necessary in order to properly market the assets and obtain the maximum value in a potential sale. . . .

13. The affidavit submitted by SED, and the evidence attached to the Motion to Show Cause, support the fact that Home Servicing . . . refused to provide the requested information based on instructions given to it by [d]efendants 3 Star, Johnson, TMPS[,] . . . and . . . Hyland. . . .

14. The affidavit submitted by SED, and the evidence attached to the Motion to Show Cause, support the fact that . . . Home Servicing . . . has refused to provide a disclosure of all monies [it has] collected . . . and/or held in escrow regarding the assets at issue.

Based on these findings, the trial court concluded as a matter of law that: (1) the injunction did not affect a substantial right of defendants and was thus not immediately appealable, and (2) the trial court retained jurisdiction to enforce the terms of its injunction while defendants' appeal was pending in this Court. The parties eventually agreed to a consent order that required Home Servicing to produce servicing data on the loan pool; however, the information that was produced indicated that loans covered by the injunction had been sold and that Home Servicing had failed to deposit service fees it collected from those transactions

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in escrow. Consequently, the trial court entered additional show cause orders to enforce the injunction. The trial court ultimately entered a 5 January 2016 order that held defendants in civil contempt. Defendants now appeal the entry of the contempt orders.

II. Standard of Review

Appellate review of a contempt order is ordinarily “limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law.” *Middleton v. Middleton*, 159 N.C. App. 224, 226, 583 S.E.2d 48, 49 (2003) (citation omitted). Yet in this case, defendants do not directly attack the contempt orders; instead, they challenge the trial court’s subject matter jurisdiction to enter those orders. “The standard of review for lack of subject matter jurisdiction is *de novo*.” *Keith v. Wallerich*, 201 N.C. App. 550, 554, 687 S.E.2d 299, 302 (2009) (citation omitted).

III. Analysis

Defendants’ sole argument on appeal is that the trial court lacked jurisdiction to enter any of its contempt orders. According to defendants, the trial court had no jurisdiction over the case following their 19 February 2015 notice of appeal from the injunction. The gravamen of defendants’ argument is that the orders entered while the appeal was pending are nullities and should be vacated. We disagree.

The longstanding, general rule in North Carolina is that when a party gives notice of appeal, the trial court is divested of jurisdiction until the appellate court returns a mandate in the case. *E.g.*, *Lowder v. All Star Mills, Inc.*, 301 N.C. 561, 580, 273 S.E.2d 247, 258 (1981) (“The well-established rule of law is that ‘an appeal from a judgment rendered in the Superior Court suspends all further proceedings in the cause in that court, pending the appeal.’”) (quoting *Harris v. Fairley*, 232 N.C. 555, 556, 61 S.E.2d 619, 620 (1950)); *Hoke v. Atl. Greyhound Corp.*, 227 N.C. 374, 375, 42 S.E.2d 407, 408 (1947). To that end, our General Assembly has provided that an appeal from a trial court order or judgment automatically “stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein[.]” N.C. Gen. Stat. § 1-294 (2015). Pending the appeal, the trial judge is generally *functus officio*, *France v. France*, 209 N.C. App. 406, 410, 705 S.E.2d 399, 404 (2011), Latin for “having performed his or her office,” which is defined as being “without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.” Black’s Law Dictionary 743 (9th ed. 2009). The principle behind the common law doctrine of *functus officio*, which safeguards

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the rule codified in section 1-294, “stems from the general rule that two courts cannot ordinarily have jurisdiction of the same case at the same time.” *RPR & Assocs., Inc. v. Univ. of N. Carolina-Chapel Hill*, 153 N.C. App. 342, 347, 570 S.E.2d 510, 513 (2002), *cert. denied and disc. review denied*, 357 N.C. 166, 579 S.E.2d 882 (2003).

Even so, the rule codified at section 1-294 and, by extension, the *functus officio* doctrine, are not without exceptions. For instance, even when a party has noted an appeal, the trial court “retains jurisdiction to take action which aids the appeal, . . . and to hear motions and grant orders,” when those matters are “ ‘not affected by the judgment appealed from.’ ” *Faulkenbury v. Teachers’ & State Employees’ Ret. Sys. of N. Carolina*, 108 N.C. App. 357, 364, 424 S.E.2d 420, 422 (quoting N.C. Gen. Stat. § 1-294), *aff’d per curiam*, 335 N.C. 158, 436 S.E.2d 821 (1993). Section 1-294’s automatic stay is easily applied in the context of a final judgment, “one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court.” *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950). A final judgment “is always appealable,” for the trial court has completed its duties. *Embler v. Embler*, 143 N.C. App. 162, 164, 545 S.E.2d 259, 261 (2001). Yet an interlocutory order, one that “does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy[,]” is generally not appealable. *Veazey*, 231 N.C. at 362, 57 S.E.2d at 381. North Carolina law therefore recognizes that merely giving notice of appeal from an interlocutory order does not automatically deprive the trial court of jurisdiction. Instead, the scope of a trial court’s continuing jurisdiction—if jurisdiction continues at all—largely depends upon whether the interlocutory order being challenged is eligible for immediate review.

If a party appeals from an interlocutory order that is immediately appealable, the trial court’s jurisdiction is removed and it may not proceed on any matters embraced by the order. *Patrick v. Hurdle*, 7 N.C. App. 44, 45, 171 S.E.2d 58, 59 (1969); *see also* N.C. Gen. Stat. § 1-294. “Where a party appeals from a nonappealable interlocutory order, however, such appeal does not deprive the trial court of jurisdiction and thus the court may properly proceed with the case.” *RPR & Assocs.*, 153 N.C. App. at 347, 570 S.E.2d at 514 (citation omitted). The latter rule serves to prevent litigants from delaying “the administration of justice [by] bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders.” *Veazey*, 231 N.C. at 363, 57 S.E.2d at 382.

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Immediate review is available where an interlocutory order “affects a substantial right that ‘will clearly be lost or irremediably adversely affected if the order is not review[ed] before final judgment.’” *Edmondson v. Macclesfield L-P Gas Co.*, 182 N.C. App. 381, 391, 642 S.E.2d 265, 272 (2007) (quoting *Blackwelder v. Dept. of Human Res.*, 60 N.C. App. 331, 335, 299 S.E.2d 777, 780 (1983)); *see also* N.C. Gen. Stat. § 1-277(a) (2015) (“An appeal may be taken from every judicial order or determination of a [trial] judge . . . which affects a substantial right claimed in any action or proceeding[.]”); N.C. Gen. Stat. § 7A-27(b)(3) (2015) (providing a right of appeal from any interlocutory order that, *inter alia*, affects a substantial right). As our Supreme Court has acknowledged, this determination must be made on a case-by-case basis: “[T]he ‘substantial right’ test for appealability of interlocutory orders is more easily stated than applied. It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered.” *Waters v. Qualified Pers., Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978). Despite the muddy waters of the substantial right test, it is clear that a trial court need not await the appellate court’s decision as to whether an appeal has been attempted from a nonappealable interlocutory order. Indeed, because “a litigant cannot deprive the trial court of jurisdiction to determine a case on its merits by appealing from a nonappealable interlocutory order[.]” *Velez v. Dick Keffer Pontiac-GMC Truck, Inc.*, 144 N.C. App. 589, 591, 551 S.E.2d 873, 875 (2001), “[t]he trial court has the authority . . . to determine whether or not its order affects a substantial right of the parties or is otherwise immediately appealable.” *RPR & Assocs.*, 153 N.C. App. at 348, 570 S.E.2d at 514 (citations omitted).

In the instant case, the trial court determined that its injunction did not affect a substantial right and thus was not immediately appealable. As a result, the court found that it retained jurisdiction to hold contempt proceedings and enforce its injunction order. SED contends that the facts related to jurisdiction in *RPR Assocs.* are indistinguishable from those in the present case. After careful review, we agree.

In *RPR Assocs.*, the defendant appealed from an interlocutory order denying its motion to dismiss based on sovereign immunity. 153 N.C. App. at 344, 570 S.E.2d at 512. Despite the appeal, the plaintiff continued to pursue its claims at the trial level and argued that the interlocutory order was not immediately appealable. *Id.* at 344-45, 570 S.E.2d at 512. In response, the defendant moved the trial court on two occasions to stay proceedings pending the appeal, but both motions were denied. *Id.* at 345, 570 S.E.2d at 512-13. This Court initially granted the defendant’s

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motion for a temporary stay pending the appeal and then later dissolved it. *Id.* at 345, 570 S.E.2d at 512. Our Supreme Court also denied the defendants' petitions for certain extraordinary writs. *Id.*

Upon consideration of the defendant's appeal from the denial of its motion to dismiss, this Court determined that the interlocutory order affected a substantial right, but ultimately held that the motion to dismiss was properly denied because sovereign immunity had been waived. *RPR & Assocs. v. State*, 139 N.C. App. 525, 527, 534 S.E.2d 247, 250 (2000), *affirmed per curiam*, 353 N.C. 362, 543 S.E.2d 480 (2001) ("*RPR I*"). However, after the interlocutory appeal was heard by this Court in *RPR I*, but before the decision was filed, the trial court proceeded to the case's merits, heard evidence, and entered a final judgment. *RPR & Assocs.*, 153 N.C. App. at 346, 570 S.E.2d at 513. Both parties appealed from that judgment, and the defendant argued that the trial court's jurisdiction over the case was terminated once the defendant's interlocutory notice of appeal was entered in *RPR I*. *Id.* After explaining that the *functus officio* doctrine does not apply to nonappealable interlocutory orders, this Court rejected the defendant's argument, reasoning that

[b]ecause the trial court had the authority to determine whether its order affected [the] defendant's substantial rights or was otherwise immediately appealable, the trial court did not err in continuing to exercise jurisdiction over this case after [the] defendant filed its notice of appeal. The trial court's determination that the order was nonappealable was reasonable in light of established precedent and the repeated denials by the appellate courts of this State to stay proceedings. Although this Court ultimately held that [the] defendant's appeal affected a substantial right, it also held that defendant was not immune to suit. [The d]efendant states no grounds, nor has it produced any evidence to demonstrate how it was prejudiced by the trial court's exercise of jurisdiction over this case.

Id. at 349, 570 S.E.2d at 515.

At the very least, *RPR & Assocs.* stands for two general propositions: (1) a trial court properly retains jurisdiction over a case if it acts reasonably in determining that an interlocutory order is not immediately appealable, and (2) that determination may be considered reasonable even if the appellate court ultimately holds that the challenged order is subject to immediate review.

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Given this backdrop, we conclude that both the procedural posture of this case, and the jurisdictional issues it presents, are substantially similar to the situation in *RPR & Assocs.* Defendants filed notice of appeal on 19 February 2015 from the trial court's order granting SED's motion for preliminary injunctive relief. Meanwhile, the trial court proceeded with contempt proceedings to enforce the order. As with the motion to dismiss based upon sovereign immunity in *RPR & Assocs.*, this Court held that defendants' interlocutory appeal of the injunction affected a substantial right and was immediately appealable. *SED I*, __ N.C. App. __, 784 S.E.2d at 630. But "such a holding was not a foregone conclusion." *RPR & Assocs.*, 153 N.C. App. at 348, 570 S.E.2d at 514.

It is clear that injunctive orders entered only to maintain the status quo pending trial are not immediately appealable. *Barnes v. St. Rose Church of Christ, Disciples of Christ*, 160 N.C. App. 590, 592, 586 S.E.2d 548, 550 (2003); *Stancil v. Stancil*, 94 N.C. App. 760, 763-64, 381 S.E.2d 720, 722-23 (1989); *Dixon v. Dixon*, 62 N.C. App. 744, 745, 303 S.E.2d 606, 607 (1983). Then again, reasonable minds may disagree as to whether a particular injunction simply maintains the status quo. Beyond that, our courts have taken a flexible approach with respect to the appealability of orders granting injunctive relief. Most relevant to this case, orders affecting a party's ability to conduct business or control its assets may or may not implicate a substantial right.

In *Barnes*, after the plaintiff alleged that a pastor had improperly converted the legal status of a church from an unincorporated religious association to a non-profit corporation and breached his fiduciary duties by transferring the church's assets to corporate accounts, the trial court enjoined the transfer of assets and appointed a receiver to manage the church's finances and assets pending a resolution on the merits. 160 N.C. App. at 591, 586 S.E.2d at 549. On appeal, the defendants argued that the injunction and appointment of a receiver prevented the church from conducting its own business. *Id.* at 592, 586 S.E.2d at 550. This Court disagreed, noting that because the injunctive relief did not halt the church's day-to-day operations and was designed to maintain the status quo of the church's finances during the litigation, no substantial right had been affected, and thus the challenged orders were not immediately appealable. *Id.*

By contrast, in *Scottish Re Life Corp. v. Transamerica Occidental Life Ins. Co.*, which involved a high-stakes dispute over reinsurance contracts, the preliminary injunction was subject to immediate review: "Given the large amount of money at issue in this case [(\$30,000,000.00)],

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the fact that the trial court impinged appellant's right to the use and control of those assets, and the unavoidable and lengthy delays [of planned arbitration proceedings in the matter,] . . . we hold that appellant must be granted its appeal to preserve a substantial right." 184 N.C. App. 292, 294-95, 647 S.E.2d 102, 104 (2007).

Here, the trial court adopted *Barnes'* reasoning to support its determination that the preliminary injunction was not immediately appealable, while this Court in *SED I* cited *Scottish Re Life Corp.* to support its determination that the preliminary injunction was immediately appealable. *SED I*, __ N.C. App. __, 784 S.E.2d at 630. The decisions in *Barnes* and *Scottish Re Life Corp.* underscore the fact that there are "[n]o hard and fast rules . . . for determining which appeals affect a substantial right." *Cagle v. Teachy*, 111 N.C. App. 244, 246, 431 S.E.2d 801, 802 (1993). Furthermore, this Court clearly explained the injunction's purpose in *SED I*:

[SED] claims it would incur irreparable harm if [d]efendants were able to liquidate the monies or mortgages arising from the mortgage sale. Prohibiting [d]efendants from moving these assets for the pendency of litigation maintains the status quo and protects the monetary and injunctive relief [SED] seeks. Moreover, [d]efendants' rights are protected by the \$100,000.00 bond posted by [SED].

__ N.C. App. at __, 784 S.E.2d at 632.

Because the injunctive relief was designed to maintain the status quo, and given that established precedent regarding the appealability of such orders is equivocal, the trial court reasonably concluded that its injunction was not immediately appealable. While this Court eventually held in *SED I* that defendants' appeal affected a substantial right, that decision was not dispositive of whether the trial court acted reasonably in determining that the appeal had not divested it of jurisdiction. *RPR & Assocs.*, 153 N.C. App. at 348, 570 S.E.2d at 514. As such, the trial court was not *functus officio*. This Court also held that the trial court's ruling on SED's motion for injunctive relief was not erroneous. Defendants therefore cannot demonstrate how they were "prejudiced by the trial court's [decision to continue to] exercise . . . jurisdiction over this case" by enforcing its injunction. *Id.* Accordingly, pursuant to the principles announced in *RPR & Assocs.*, we conclude that the trial court retained jurisdiction to enter orders related to the contempt proceedings in this case while defendants' interlocutory appeal was pending in this Court.

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IV. Conclusion

Given the particular facts at issue and the procedural context in which the contempt orders were entered, the trial court acted reasonably in continuing to exercise jurisdiction over the case while defendants' appeal of the injunction was pending in this Court. Furthermore, because the injunction was ultimately upheld, the contempt orders entered to enforce it did not prejudice defendants. Consequently, the trial court retained jurisdiction to enter the contempt orders and we affirm the entry of each order.

AFFIRMED.

Judges ELMORE and ENOCHS concur.

STATE OF NORTH CAROLINA

v.

LEONARD HARDY, DEFENDANT

No. COA16-506

Filed 1 November 2016

1. Sentencing—de novo hearing—resentencing—independent evaluation of evidence

The trial court did not err in a larceny after breaking and entering and injury to real property case by allegedly depriving defendant of his right to a de novo sentencing hearing. A second judge conducted his own independent evaluation of the evidence and did not merely defer to the prior judge's original sentence. Further, defendant did not present any new evidence at resentencing.

2. Damages and Remedies—restitution—issue foreclosed on remand

The trial court did not err in a larceny after breaking and entering and injury to real property case by failing to find a restitution award should be reduced in light of the new evidence defendant introduced at the resentencing hearing. *Hardy I* resolved and foreclosed any reconsideration by the trial court of the restitution award entered against defendant on remand.

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Appeal by defendant from judgment entered 30 November 2015 by Judge Paul L. Jones in Wayne County Superior Court. Heard in the Court of Appeals 21 September 2016.

Attorney General Roy Cooper, by Solicitor General John F. Maddrey for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Hannah H. Love, for defendant-appellant.

ENOCHS, Judge.

Leonard Hardy (“Defendant”) appeals from the trial court’s judgment re-sentencing him to 77 to 102 months imprisonment and ordering him to pay \$7,408.91 in restitution. On appeal, he contends that the trial court deprived him of his right to a *de novo* sentencing hearing and erred by failing to reconsider its prior restitution award. After careful review, we affirm.

Factual Background

This case is before us for the second time. The underlying facts are set out more fully in *State v. Hardy*, ___ N.C. App. ___, ___, 774 S.E.2d 410, 412-13 (2015) (“*Hardy I*”), and are quoted, in pertinent part, as follows:

On 25 July 2011, Zulema Bass (“Ms. Bass”) arrived home and noticed that her mobile home was hot inside even though the air-conditioner was on. After hearing a loud noise outside, she asked her fifteen-year-old son Brendell Bass (“Brendell”) to investigate. Brendell went to the back door and began screaming that a man [later identified as Defendant] was out there. Ms. Bass ran to the door and saw a man riding away on a bicycle; she only saw half of the man’s face and was unable to identify him. Ms. Bass went outside and saw that the air-conditioning unit was “demolished” and noticed a twisted pipe on the ground beside the unit. She also noticed that there was extensive water damage under her home from “pipes leaking everywhere.” Ms. Bass called 911. . . .

. . . .

Jack Gregory (“Mr. Gregory”), a handyman with 40 years of experience, testified that he went to Ms. Bass’s

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mobile home to inspect and attempt to repair the air-conditioner. Mr. Gregory explained that Ms. Bass's air-conditioner was a two-piece unit. The outside unit was a condensing unit, which sat on the ground outside the mobile home and is connected to a second unit. The second unit, known as the A-coil, was located on the inside of the home and sat on the top of the home's heater. A high pressure copper pipe beneath the mobile home connected the outside unit to the indoor A-coil. Mr. Gregory testified that Ms. Bass's outside condensing unit had been completely "gutted." The compressor had been completely removed, and the wiring in the control box had been pulled out. Almost the entire high pressure copper piping that ran beneath the home had been removed. Mr. Gregory also noted some water line damage in the crawl-space of the mobile home; the water lines were broken so extensively that the entire back side of the brick wall on the underpinning was "soaked through." The air-conditioner was inoperable and beyond repair.

Dale Davis ("Mr. Davis") testified that he owned the mobile home but used it as a rental property. He testified that he had received an estimate of over \$6,000 to repair "just the AC" from Jackson & Sons.

On 7 November 2011, Defendant was indicted for (1) breaking and entering; (2) larceny after breaking and entering; (3) possession of stolen goods; (4) injury to real property; and (5) attaining the status of an habitual felon. Beginning on 13 February 2012, a jury trial was held before the Honorable W. Allen Cobb, Jr., in Wayne County Superior Court.

Defendant was found guilty of all charges. In exchange for the State's recommendation of a mitigated sentence, Defendant pled guilty to attaining habitual felon status. *Id.* at ___, 774 S.E.2d at 413.

On 14 February 2012, the trial court sentenced Defendant to 77 to 102 months imprisonment and ordered Defendant to pay \$7,408.91 in restitution. *Id.* at ___, 774 S.E.2d at 413. After sentencing Defendant, the trial court arrested judgment on Defendant's conviction for possession of stolen goods. However, the trial court did not modify Defendant's sentence and he appealed. *Id.* at ___, 774 S.E.2d at 414.

Defendant raised multiple issues on his initial appeal, including an argument that the trial court erred during sentencing. We held as follows as to that issue:

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Finally, defendant argues that the trial court erred by sentencing him for both felony larceny and felony possession of stolen goods and that the trial court's order arresting judgment for felony possession of stolen goods did not cure the error. We agree and remand for resentencing.

When the trial court consolidates multiple convictions into a single judgment but one of the convictions was entered in error, the proper remedy is to remand for resentencing when the appellate courts "are unable to determine what weight, if any, the trial court gave each of the separate convictions . . . in calculating the sentences imposed upon the defendant." *State v. Moore*, 327 N.C. 378, 383, 395 S.E.2d 124, 127-28 (1990).

Here, defendant was indicted for and convicted of felony larceny and felonious possession of stolen goods ("felony possession"). After the jury returned its verdict, based on the State's agreement to a mitigated sentence, defendant pled guilty to attaining habitual felon status pursuant to N.C. Gen. Stat. § 14-7.6. After determining that defendant had a prior record level of IV, the trial court consolidated the offenses for judgment and sentenced him to 77 months to 102 months imprisonment. Under the version of N.C. Gen. Stat. § 14-7.6 that was in effect at the time defendant committed the offenses, defendant was automatically sentenced as a Class C felon. Although the State requested a sentence at the high end of the mitigated range, the trial court imposed a sentence in the mid-point of the mitigated range. Defendant was sentenced to 77 to 102 months imprisonment. The allowable mitigated sentence for these offenses committed by a defendant with a class IV prior record level ranges from a minimum of 66 to a maximum of 166 months imprisonment.

Later the same day, following the sentencing hearing, likely based on the trial court's recognition that a defendant may be [sic] not be convicted of both larceny and possession of stolen property based on the same conduct, *State v. Perry*, 305 N.C. 225, 237, 287 S.E.2d 810, 817 (1982)[,] *overruled on other grounds by State v. Mumford*, 364 N.C. 394, 699 S.E.2d 911 (2010), the trial court arrested judgment on the felony possession conviction but did not modify defendant's sentence.

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Despite the trial court's subsequent order arresting the entry of judgment for felony possession, we are unable to determine whether the trial court gave any weight to that conviction when it sentenced defendant in the middle of the mitigated range instead of at a lower point in that range, especially since the trial court found the mitigating factor that defendant accepted responsibility for his criminal conduct and found no factors in aggravation. Therefore, we must remand this matter back to the trial court for resentencing. *See Moore*, 327 N.C. at 383, 395 S.E.2d at 128. Sentencing within the mitigated range remains within the trial court's discretion.

....

In sum, we conclude that the trial court did not commit prejudicial error when it overruled defense counsel's objection and refused to strike hearsay testimony. We further conclude that, given the evidence in this case, the trial court did not err in denying defendant's motion to dismiss the charge of injury to real property and did not err in instructing the jury that the air-conditioner was real property. Because the amount of restitution was supported by evidence at trial, the trial court's order of restitution was without error. Finally, because we are unable to determine what weight, if any, the trial court gave to the erroneous entry of judgment on felony possession despite the fact that the trial court later arrested that judgment, we must remand for resentencing.

Id. at ___, 774 S.E.2d at 420-21 (internal footnote omitted).

On remand, the trial court conducted a new sentencing hearing on 30 November 2015 before the Honorable Paul L. Jones in Wayne County Superior Court which is the subject of the present appeal. At the hearing, Defendant introduced new evidence as to the amount of restitution that should be awarded. He then requested that he be resentenced at the low end of the mitigated range based on the following representation made by his trial counsel:

[Defendant is] 55 years old. He's at Caledonia Work Farm, which is where he's spent the last two or three years, and he's not gotten in any trouble, he tells me -- and he works with chickens; and his sister lives in Wayne County, and he

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feels like, and I feel like, once he gets out he can get a job in Wayne County or Lenoir County working with chickens.

After considering the parties' arguments and evidence, the trial court sentenced Defendant to 77 to 102 months imprisonment which is within the mitigated range and was the same term imposed by Judge Cobb at Defendant's original sentencing hearing. The trial court left the \$7,408.91 restitution award in place after examining the State's exhibits concerning restitution which were re-admitted at the re-sentencing hearing. Defendant gave oral notice of appeal in open court.

AnalysisI. Re-Sentencing Hearing

[1] Defendant's first argument on appeal is that the trial court deprived him of his right to a *de novo* sentencing hearing. Specifically, he contends that the trial court merely deferred to Judge Cobb's judgment and left his prior sentence in place without considering the matter anew and conducting an independent review of the evidence presented at the re-sentencing hearing. We disagree.

"For all intents and purposes the resentencing hearing is *de novo* as to the appropriate sentence. On resentencing the judge makes a new and fresh determination of the presence in the evidence of aggravating and mitigating factors. The judge has discretion to accord to a given factor either more or less weight than a judge, or the same judge, may have given at the first hearing. However, in the process of weighing and balancing the factors found on rehearing the judge cannot impose a sentence greater than the original sentence."

State v. Morston, 221 N.C. App. 464, 469, 728 S.E.2d 400, 405 (2012) (internal citations omitted) (quoting *State v. Mitchell*, 67 N.C. App. 549, 551, 313 S.E.2d 201, 202 (1984)). "[W]hen a trial court relies on a previous court's sentence determination and fails to conduct its own independent review of the evidence, a defendant is deprived of a *de novo* sentencing hearing." *State v. Watkins*, ___ N.C. App. ___, ___, 783 S.E.2d 279, 284 (2016). Significantly, however, "[a] trial court's resentencing of a defendant to the same sentence as a prior sentencing court is not *ipso facto* evidence of any failure to exercise independent decision-making or conduct a *de novo* review." *Morston*, 221 N.C. App. at 470, 728 S.E.2d at 406.

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Here, Defendant argues that the re-sentencing transcript suggests that the trial court did not conduct a *de novo* review, but rather simply relied upon and re-implemented Judge Cobb's original determination of Defendant's sentence. Specifically, Defendant points to the following statement of Judge Jones:

Well, I don't think it would be appropriate for the Court to basically overrule Judge Cobb. He heard the evidence, he arrested judgment, and he still considered that the sentence did not need to be disturbed.

Based upon that, Judge Cobb being aware of all the facts, the Court resentences him to a term of 77 to 102 months in the North Carolina Department of Corrections. Thank you.

However, a broader reading of the re-sentencing hearing transcript does not, as Defendant posits, tend to show that Judge Jones was merely deferring to and adopting Judge Cobb's findings and ruling. Rather, it reveals that after allowing both Defendant and the State the opportunity to present new evidence at the hearing, Judge Jones reviewed the evidence and made his own determination as to Defendant's sentence in accordance with *Morston*. We read Judge Jones' above-quoted statement at the conclusion of the hearing as simply reflecting his agreement with Judge Cobb's ruling based on his own independent assessment. It does not, upon an examination of the entirety of the proceedings, indicate that Judge Jones was operating under a misapprehension of the law in that he believed he was obligated to take Judge Cobb's ruling into consideration in reaching his ultimate determination.

Defendant's citation to *State v. Abbott*, 90 N.C. App. 749, 370 S.E.2d 68 (1988), is thus inapposite to the facts of the present case. In *Abbott*, at the defendant's re-sentencing hearing, the trial judge expressly stated "I've tried to be consistent with [the original sentencing judge]" and then "perused defendant's file before finding the identical aggravating factor." *Id.* at 751, 370 S.E.2d at 69.

In the present case, Judge Jones allowed Defendant the opportunity to put on additional evidence concerning why he should be sentenced at the low end of the mitigated range. Instead of doing so, Defendant chose to only introduce new evidence as to why the amount of the restitution award should be reduced. In fact, all that Defendant's trial counsel presented to the trial court as to why Defendant's prison sentence should be reduced was his own argument — unsupported by any evidence — that

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[Defendant is] 55 years old. He's at Caledonia Work Farm, which is where he's spent the last two or three years, and he's not gotten in any trouble, he tells me -- and he works with chickens; and his sister lives in Wayne County, and he feels like, and I feel like, once he gets out he can get a job in Wayne County or Lenoir County working with chickens.

"[I]t is axiomatic that the arguments of counsel are not evidence." *State v. Collins*, 345 N.C. 170, 173, 478 S.E.2d 191, 193 (1996). Therefore, the above-quoted statement of Defendant's attorney does not constitute competent evidence as to why Defendant's prison sentence should have been reduced.

Consequently, because we find that Judge Jones did, in fact, undertake his own independent evaluation of the evidence and did not operate under any misapprehension of the law that he was obligated to defer to Judge Cobb's original sentence, and because Defendant did not present any new evidence at the re-sentencing hearing as to why he should be given a lesser sentence at the low end of the mitigated range, we hold that the trial court did not err in re-sentencing Defendant to 77 to 102 months imprisonment. Defendant's argument on this issue is overruled.

II. Law of the Case Doctrine

[2] Defendant's final argument on appeal is that the trial court erred in failing to find that the restitution award entered against Defendant should be reduced in light of the new evidence he introduced at the re-sentencing hearing as to the valuation of the cost to fix the damage to the mobile home. Once again, we disagree.

[T]his Court's interpretation of its own mandate is properly considered an issue of law reviewable *de novo*. On the remand of a case after appeal, the mandate of the reviewing court is binding on the lower court, and must be strictly followed, without variation and departure from the mandate of the appellate court. It is well-established that in discerning a mandate's intent, the plain language of the mandate controls.

Watkins, ___ N.C. App. at ___, 783 S.E.2d at 282-83 (internal citations, quotation marks, and brackets omitted).

We have recently emphasized that "remands may be general or limited in scope. . . . [I]n the context of resentencing remands, a limited remand must convey clearly the intent to limit the scope of the district court's review." *Id.* at ___, 783 S.E.2d at 283-84 (internal quotation marks

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and brackets omitted). It is also the case that “the mandate must be construed in the context of the entire opinion and reasoning underlying the remand.” *Id.* at ___, 783 S.E.2d at 285.

Defendant asserts that our remand of the case in *Hardy I* was a general, as opposed to a limited, remand. However, a plain reading of *Hardy I* clearly indicates that our remand was limited in nature and only applicable to the length of Defendant’s prison sentence and whether or not it should have been at the lower end — as opposed to the middle — of the mitigated range. As we unambiguously stated in *Hardy I*,

[b]ecause the amount of restitution was supported by evidence at trial, the trial court’s order of restitution was without error. Finally, because we are unable to determine what weight, if any, the trial court gave to the erroneous entry of judgment on felony possession despite the fact that the trial court later arrested that judgment, we must remand for resentencing.

___ N.C. App. at ___, 774 S.E.2d at 421.

Hardy I clearly resolved and foreclosed any reconsideration by the trial court of the restitution award entered against Defendant on remand. Our mandate plainly limited the re-sentencing proceedings to a determination of where in the mitigated range the term of Defendant’s prison sentence should fall. Consequently, the trial court did not err in declining to reconsider the restitution award during re-sentencing. Indeed, had it done so, it would have violated our mandate. As a result, Defendant’s argument on this issue is without merit.

Conclusion

For the reasons stated above, Defendant’s sentence is affirmed.

AFFIRMED.

Judge ELMORE concurs.

Judge ZACHARY concurs in part and dissents in part in a separate opinion.

ZACHARY, Judge, concurring in part and dissenting in part.

I concur with the majority that, on the facts of this case, the trial court did not err by declining to enter a new order for restitution. I

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cannot agree, however, with the majority's conclusion that the trial court afforded defendant the *de novo* sentencing hearing to which he was entitled. The trial court explicitly stated that if, in resentencing defendant, the court were to impose a sentence that differed from that of the original sentencing judge, such a sentence would be "inappropriate" and would constitute "overruling" the original sentencing judge. Moreover, review of the resentencing transcript reveals no countervailing statements by the trial court suggesting that the court based its resentencing decision upon an independent review of the evidence. For this reason, I would hold that the trial court deprived defendant of his right to a *de novo* sentencing hearing, and respectfully dissent from the majority's holding on this issue.

It is long "established that each sentencing hearing in a particular case is a *de novo* proceeding." *State v. Abbott*, 90 N.C. App. 749, 751, 370 S.E.2d 68, 69 (1988) (citing *State v. Jones*, 314 N.C. 644, 336 S.E.2d 385 (1985)). " '[D]e novo means fresh or anew; for a second time;' and a *de novo* hearing in a reviewing court is a new hearing, as if no action had been taken in the court below." *State v. Watkins*, __ N.C. App. __, __, 783 S.E.2d 279, 283 (2016) (quoting *In re Hayes*, 261 N.C. 616, 622, 135 S.E.2d 645, 649 (1964)).

In *State v. Daye*, 78 N.C. App. 753, 755, 338 S.E.2d 557, 559 (1986), this Court noted that a "new and fresh determination" on resentencing "may require no more than a review of the record and transcript of the trial or original sentencing hearing, at least when no additional evidence is offered at the resentencing hearing." On the other hand, " 'the trial court must consider evidence of aggravating and mitigating factors' offered by the parties, even if a presumptive sentence is ultimately imposed." *State v. Knott*, 164 N.C. App. 212, 217, 595 S.E.2d 172, 176 (2004) (quoting *State v. Kemp*, 153 N.C. App. 231, 239, 569 S.E.2d 717, 722, *disc. review denied*, 356 N.C. 441, 573 S.E.2d 158 (2002)). Thus the admission of new evidence is not dispositive on the issue of whether the trial court properly afforded a defendant a *de novo* sentencing hearing. Instead, the critical inquiry is whether the trial court's "consideration of and reliance upon the previous court's determination denied defendant his right to a *de novo* hearing." *Abbott*, 90 N.C. App. at 751, 370 S.E.2d at 69.

In examining a defendant's contention that on resentencing the trial court improperly relied upon the previous judge's sentence, we consider the trial court's statements in the context of the entire proceeding. For example, in *State v. Morston*, 221 N.C. App. 464, 728 S.E.2d 400 (2012), the defendant argued that he had not received a *de novo*

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sentencing hearing because the trial court had characterized the purpose of the resentencing as being “to rectify the paperwork more than anything else.” *Morston*, 221 N.C. App. at 468, 728 S.E.2d at 405. This Court acknowledged the trial court’s statement, but held that a review of the proceeding indicated that the trial court did not simply rely on its prior ruling:

... [T]he trial court made more than just the statement that it was correcting previous clerical errors, but in fact stated, “[h]aving heard testimony— new testimony today and also having received the transcript of the trial, based on all of that, I will render my judgments now, so, Mr. Morston, if you would stand up.” Three of the six mitigating factors found by the trial court at the 2011 hearing were not found at the prior sentencing hearings. Moreover, defendant testified at the 2011 hearing after not testifying in either of the previous hearings. Clearly, the trial court considered new evidence and made new determinations regarding the mitigating factors in hearing defendant’s testimony.

Morston at 470, 728 S.E.2d at 405-06.

However, where a review of the resentencing hearing shows that “the resentencing court improperly considered the judgment of the original sentencing court,” the resentencing judge’s “consideration of and reliance upon the previous court’s determination denie[s] defendant his right to a *de novo* hearing.” *Abbott*, 90 N.C. App. at 750-51, 370 S.E.2d at 69. In *Abbott*, the trial court stated that:

COURT: . . . [T]he Presiding Judge, Claude Sitton, heard this case from the beginning to the end; and he felt it necessary based upon his perception of the evidence in the case to enter the sentence that he did; and *I’ve tried to be consistent with Judge Sitton* and also my individual consideration of the factors that you have offered me and have, therefore, imposed the sentences that I have imposed.

Abbott at 750-51, 370 S.E.2d at 69 (emphasis in original). On these facts we held that:

In the case *sub judice*, the trial court’s statement that it was trying to be consistent with Judge Sitton, while not intimating that the previous findings were the law of the case, indicates to us that its decision was not independent.

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We agree with defendant that it appears that the resentencing court based its decision in part upon the trial court's perception of the evidence and judgment at the prior sentencing hearing. In having made the aforementioned statement, the trial court created an ambiguity as to its reasoning for imposing the sentence that it did. . . . Thus, the apparent consideration of the trial court's judgment upon resentencing violated the defendant's right to a hearing *de novo*.

Abbott at 752, 370 S.E.2d at 69-70.

A review of the transcript of the resentencing hearing in this case reveals that each and every statement of the trial court regarding the court's role in resentencing reflected the court's misapprehension of the *de novo* nature of the proceeding. Judge W. Allen Cobb, Jr. presided over defendant's original sentencing hearing. When the prosecutor summarized the procedural history of the case and explained that this Court had remanded it for a new sentencing hearing, the trial court responded by asking, "So I'm supposed to get in Judge Cobb's head?" This comment shows that the trial court was approaching the resentencing as a referendum on Judge Cobb's original sentence, and not as a fresh look at the evidence. The prosecutor did not discourage this reasoning and argued to the court that "Judge Cobb heard the trial, heard the evidence" and that "the State's position" was that Judge Cobb had imposed a fair sentence. Following the presentation of evidence and arguments of counsel, the trial court stated that:

THE COURT: Well, *I don't think it would be appropriate for the Court to basically overrule Judge Cobb*. He heard the evidence, he arrested judgment, and he still considered that the sentence did not need to be disturbed. *Based upon that, Judge Cobb being aware of all the facts*, the Court resentsences him to a term of 77 to 102 months in the North Carolina Department of Corrections.

I find *Abbott* to be functionally indistinguishable from the present case, and to be controlling on the issue of whether defendant was afforded a *de novo* resentencing hearing. Indeed, a review of the transcript of the resentencing hearing in this case reveals that the trial court's reliance upon the original sentencing judge's sentence was more explicit than that of *Abbott*, in that (1) unlike the trial judge in *Abbott*, the

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court in the present case did not mention its “individual consideration of the factors that you have offered me,” or make any other statement indicating that it had made an independent review of the evidence, and (2) while the trial judge in *Abbott* stated that it had “tried to be consistent” with the original sentencing court, in this case the trial court expressly stated that it would be “inappropriate” and would constitute “overruling” Judge Cobb to impose a different sentence. It is hard to imagine how the court could have been more straightforward about its misapprehension of the nature of a resentencing hearing.

The majority acknowledges the trial court’s statements, but holds that “a broader reading of the resentencing transcript” establishes that the trial court’s comments were “simply reflecting his agreement with Judge Cobb’s ruling based on his own independent assessment.” The majority opinion does not identify any excerpts from the resentencing transcript that demonstrate an “independent assessment” by the trial court, and my own review fails to reveal any statements by the trial court suggesting that it took a fresh look at the evidence. Moreover, regardless of the trial court’s internal reasoning as regards defendant’s sentence, “having made the aforementioned statement, the trial court created an ambiguity as to its reasoning for imposing the sentence that it did. . . . [T]he apparent consideration of the trial court’s judgment upon resentencing violated the defendant’s right to a hearing *de novo*.” *Abbott* at 752, 370 S.E.2d at 70.

I believe that the record in this case establishes beyond dispute that the trial court explicitly considered the sentence imposed by the original sentencing judge in resentencing defendant, thereby depriving defendant of a *de novo* sentencing proceeding. I would reverse and remand for a new sentencing proceeding. For this reason, I respectfully dissent from the majority opinion.

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STATE OF NORTH CAROLINA

v.

C.D. HUNT

No. COA15-1289

Filed 1 November 2016

1. Arson—indictment language—“willfully”

Where defendant was convicted of burning certain buildings in violation of N.C.G.S. § 14-62, the Court of Appeals rejected his argument that the indictment was fatally defective for failure to contain the essential element that he “wantonly” set fire to burn. “Willfully” and “wantonly” are essentially the same, so the indictment charged the essential elements of the offense in words that are substantially equivalent to those used in section 14-62 with sufficient particularity to apprise defendant of the specific accusations against him.

2. Evidence—non-expert opinion testimony—proving fire was intentionally set—plain error review

Where defendant was convicted of burning certain buildings in violation of N.C.G.S. § 14-62, the Court of Appeals rejected his argument that the trial court committed plain error by allowing non-expert opinion testimony into evidence to prove the fire at issue was intentionally set. Given the unchallenged evidence in the form of direct testimony and video recordings depicting that an accelerant was used to start or accelerate the fire, defendant failed to demonstrate that any presumed error in the trial court’s performance of its gatekeeping function would have had a probable impact on the jury’s guilty verdict.

3. Constitutional Law—effective assistance of counsel—failure to object and to renew motion to dismiss

Where defendant was convicted of burning certain buildings in violation of N.C.G.S. § 14-62, the Court of Appeals rejected his argument that he received ineffective assistance of counsel because his attorney did not object to the investigator’s testimony and failed to renew the motion to dismiss at the close of all the evidence. There was nothing to suggest that the decision not to object was erroneous such that defense counsel provided unconstitutionally deficient performance. Further, defendant could not establish prejudice in trial counsel’s failure to move to dismiss the charge at the close of all evidence.

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4. Criminal Law—restitution—unsworn statement of prosecutor

Where defendant was convicted of burning certain buildings in violation of N.C.G.S. § 14-62, the Court of Appeals held that the trial court erred by ordering defendant to pay \$5,000 in restitution to the apartment complex he set on fire based on the unsworn statement by the prosecutor that the apartment complex had to pay an insurance deductible of \$5,000. Unsworn statements of a prosecutor cannot support an order of restitution.

Appeal by defendant from judgment entered 29 April 2015 by Judge James K. Roberson in Durham County Superior Court. Heard in the Court of Appeals 24 May 2016.

Attorney General Roy Cooper, by Assistant Attorney General Teresa M. Postell, for the State.

Ward, Smith & Norris, P.A., by Kirby H. Smith, III, for defendant-appellant.

BRYANT, Judge.

Where the language of the indictment was sufficient to charge defendant with burning certain buildings, the trial court properly exercised jurisdiction over the matter. Where defendant cannot establish plain error, his challenge that the trial court abandoned its gatekeeping function must fail. Likewise, where defendant cannot establish prejudice, his ineffective assistance of counsel claim must also fail. However, where the amount of restitution awarded was not supported by the evidence, we remand to the trial court for further proceedings.

On 6 January 2014, a Durham County grand jury indicted defendant C.D. Hunt on the charge of burning certain buildings, in violation of General Statutes, section 14-62. The matter came on for trial during the 23 March 2015 criminal session of Durham County Superior Court, the Honorable James Roberson, Judge presiding.

The evidence presented at trial tended to show that on 29 May 2013, Diane Stallworth, apartment complex property manager for Lynnhaven Apartments located in Durham, North Carolina, reported a break-in of apartment 7C. In addition to the Durham Police Department, Stallworth contacted the apartment resident, LaTresha Harwell, and requested that she return to the complex. At 1:00 p.m. that afternoon, Stallworth was in apartment 7C when defendant C.D. Hunt arrived. “[H]e came driving

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his vehicle. He came across the property, drove the vehicle right up into the front door of the apartment and came inside the apartment.” Stallworth described defendant’s mood as “angry or upset.” Stallworth asked defendant to remove his car, a gray four-door Nissan, from the grass and take it back to the parking lot, but defendant refused to talk with her. Defendant was not a resident of the apartment complex, but was listed as the emergency contact for Harwell, and had been observed with Harwell on a near-daily basis. When Stallworth returned to the apartment complex office, she observed defendant drive his car to the parking lot in front of the office and begin throwing trash from his car onto the grass in front of the building. Stallworth asked defendant to stop and he replied.

He said somebody broke in to my apartment. All you care about is me throwing trash. . . .

We continued to go back and forth. It was, “You got the right one”, you know, and he kind of lunged at me like he was going to hit me, so I was like, “Come on. Hit me”.

. . .

. . . It was not a friendly exchange of words.

Following this interaction, a law enforcement officer arrived in response to an apartment break-in report. While he was still there, Stallworth issued defendant a “trespassing letter” informing him he was not welcome back on the property. Early the next morning, on 30 May 2013, Stallworth received a call notifying her of a fire reported at the Lynnhaven Apartments complex office building.

After the fire was extinguished, Investigator Joel Gullie, with the Fire Prevention Bureau, Fire Marshal’s Office, City of Durham Fire Department, arrived on the scene. He had been called to the scene by the battalion chief in command on the basis that the fire was “suspicious.” Investigator Gullie testified that he was the lead investigator, and his observations led him to conclude that an accelerant had been used.

On 3 June 2014, the investigation of the fire was assigned to Durham Police Department Officer James Barr, Jr., who was working in the criminal investigation, homicide division. Stallworth provided Officer Barr with video surveillance recorded around the time of the fire which showed “a small lighter-colored four-door sedan,” which had been parked in a dead end with no parking spaces, leaving the apartment complex at a high rate of speed just before an explosion was recorded. No other vehicles were recorded leaving the lot at that time. Officer Barr

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testified that during his conversation with Stallworth, she informed him that on the day of the break-in and trash-throwing incident, defendant was driving a charcoal-colored Nissan Altima. Officer Barr also reviewed the 9-1-1 call reporting the fire made by Delanem Makara. Officer Barr spoke with Makara, who informed him that she was outside of her apartment on the night of the fire. That night, she noticed a dark gray vehicle parked “all the way down at the end.” “[S]he noticed the smell of gasoline; [t]hen, there was an explosion.”

At trial, Makara read the handwritten statement she gave to a Durham Police Officer at 2:30 a.m. on 30 May 2013:

A. “About 2:30 a.m. May 30, I seen a gray or black car Nissan pulled in, went to the other end of the parking lot, and I did not see the car leave. Around 3:20, the fire happened”, and my signature.

Q. And there is a notation off to the side in the margin?

A. Yes.

Q. And what does that say?

A. [Defendant] is the driver.

Q. There’s an arrow there?

A. It’s a Nissan.

Following the close of the State’s evidence, defendant proffered the testimony of his grandmother, also a Durham resident, who testified in substance that defendant stayed with her the evening of 29–30 May 2013 and that he did not leave.

Q. And how do you know that he didn’t leave?

A. Because I’ve been sleeping on my sofa, and that’s between my living room and my side door . . . so anybody come in the house and go out the house, I would know about it.

Following the close of all of the evidence, the jury returned a guilty verdict against defendant for burning certain buildings. The trial court entered judgment in accordance with the jury verdict and sentenced defendant to an active term of 16 to 29 months, then suspended the sentence and imposed supervised probation for a period of 36 months. Defendant was ordered to pay \$5,000 in restitution to Lynnhaven Apartments. Defendant appeals.

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On appeal, defendant raises the following issues: whether (I) the indictment against defendant was fatally defective; (II) the trial court committed plain error by admitting testimonial evidence regarding how the fire started; (III) defendant had ineffective assistance of counsel; and (IV) the trial court erred in ordering restitution.

I

[1] Defendant argues the trial court lacked jurisdiction to try him for a violation of General Statutes, section 14-62 where the indictment charging him was fatally defective. Defendant contends that the indictment charging a violation of section 14-62 failed to contain an essential element that defendant “wantonly” set fire to burn, and therefore, the indictment is fatally defective. We disagree.

“On appeal, we review the sufficiency of an indictment *de novo*.” *State v. McKoy*, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409 (2009) (citation omitted).

“An indictment is sufficient if it charges all essential elements of the offense with sufficient particularity to apprise the defendant of the specific accusations against him and (1) will enable him to prepare his defense and (2) will protect him against another prosecution for that same offense.” *State v. Bowden*, 272 N.C. 481, 483, 158 S.E.2d 493, 495 (1968); *see also* N.C.G.S §§ 15-153 (“Bill or warrant not quashed for informality”) and 15A-924(a)(5) (2015) (“Contents of pleadings . . .”). “The general rule in this State and elsewhere is that an indictment for a statutory offense is sufficient, if the offense is charged in the words of the statute, either literally or substantially, or in equivalent words.” *State v. Simpson*, 235 N.C. App. 398, 400–01, 763 S.E.2d 1, 3 (2014) (quoting *State v. Greer*, 238 N.C. 325, 328, 77 S.E.2d 917, 920 (1953)). “A facially invalid indictment deprives the trial court of jurisdiction to enter judgment in a criminal case.” *State v. Haddock*, 191 N.C. App. 474, 476, 664 S.E.2d 339, 342 (2008) (citing *State v. Call*, 353 N.C. 400, 429, 545 S.E.2d 190, 208 (2001)). But “[t]he trial court need not subject the indictment to hyper technical scrutiny with respect to form.” *Simpson*, 235 N.C. App. at 400, 763 S.E.2d at 3 (citation and quotation marks omitted).

Pursuant to North Carolina General Statutes, section 14-62, “[i]f any person shall *wantonly* and *willfully* set fire to or burn . . . any . . . warehouse, office, shop . . . [or other specified building] whether the same or any of them respectively shall then be in the possession of the offender,

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or in the possession of any other person, he shall be punished as a Class F felon.” N.C. Gen. Stat. § 14-62 (2015).

“Willfulness” means the wrongful doing of an act without justification or excuse. *State v. Arnold*, 264 N.C. 348, 141 S.E.2d 473 (1965); *State v. Williams*, 284 N.C. 67, 199 S.E.2d 409 (1973). “Wantonness” means the doing of an act in conscious and intentional disregard of and indifference to the rights and safety of others. *Hinson v. Dawson*, 244 N.C. 23, 92 S.E.2d 393 (1956). “The attempt to draw a sharp line between a ‘willful’ act and a ‘wanton’ act . . . would be futile. The elements of each are substantially the same.” *State v. Williams*, *supra*, 284 N.C. at 73, 199 S.E.2d at 412.

State v. Oxendine, 64 N.C. App. 559, 561, 307 S.E.2d 583, 584–85 (1983); *see also State v. Tew*, 62 N.C. App. 190, 193, 302 S.E.2d 633, 635 (1983) (“The essential elements of the crime . . . are that: (1) The building was used in trade; (2) a fire occurred in it; (3) the fire was of incendiary origin; and (4) the defendants unlawfully and wilfully started or were responsible for it. G.S. 14-62.”).

In the instant case, the indictment alleged that “defendant . . . unlawfully, willfully and feloniously did set fire to, burn, cause to be burned and aid the burning of an office and utility building located at 917 Wadesboro Street, Durham, North Carolina 27703.” Defendant asserts that while the indictment alleges he acted “willfully,” the failure to also allege he acted “wantonly” in setting fire to a building, renders the indictment facially invalid and fatally defective.

As noted herein, our courts have held that “willfully” and “wantonly” are essentially the same, and any attempt to distinguish them would be futile. *See Oxendine*, 64 N.C. App. at 561, 307 S.E.2d at 584–85. Therefore, we hold the indictment in the instant case charges the essential elements of the offense in words that are substantially equivalent to those used in General Statutes, section 14-62, with sufficient particularity to apprise defendant of the specific accusations against him. *See Bowden*, 272 N.C. at 483, 158 S.E.2d at 495; *Simpson*, 235 N.C. App. at 400–01, 763 S.E.2d at 3. As the indictment is sufficient, defendant’s argument is overruled.

II

[2] Next, defendant argues that the trial court committed plain error by allowing non-expert opinion testimony into evidence to prove the fire at issue was intentionally set. More specifically, defendant contends that Investigator Gullie’s testimony should have been evaluated under

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the standard set out in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469 (1993), as that standard has been implemented in amended Rule of Evidence 702 (“Testimony by experts”), as acknowledged in *State v. McGrady*, 368 N.C. 880, 884, ___ S.E.2d ___, ___ (2016). Defendant contends that where the trial court admitted Investigator Gullie’s opinion testimony without examining him under the *Daubert* standard, the court committed plain error. We disagree.

In 2011, our General Assembly amended Rule 702(a) of North Carolina’s Rules of Evidence, which governs the admissibility of testimony by an expert, to mirror Rule 702(a) of the Federal Rules of Evidence as that rule was amended in 2000. “It follows that the meaning of North Carolina’s Rule 702(a) now mirrors that of the amended federal rule.” *McGrady*, 368 N.C. at 884, ___ S.E.2d at ___. “And when the General Assembly adopts language or statutes from another jurisdiction, ‘constructions placed on such language or statutes are presumed to be adopted as well.’ ” *Id.* at 887, ___ S.E.2d at ___ (quoting *Sheffield v. Consol. Foods Corp.*, 302 N.C. 403, 427, 276 S.E.2d 422, 437 (1981)). Thus, “the 2011 amendment [of Rule 702(a)] adopts the federal standard for the admission of expert witness testimony articulated in the *Daubert* line of cases.” *Id.* at 884, ___ S.E.2d at ___.^{1,2}

But though Rule 702 was amended, our Supreme Court reasoned that the precedent established by our State appellate courts prior to the 2011 amendment should not be completely abandoned. The previous three-step inquiry established for evaluating the admissibility of expert testimony, as set out in *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004), while “‘decidedly less mechanistic and rigorous than the “exacting standards of reliability” demanded by the federal approach[,]” “ ‘share[s] obvious similarities with the principles underlying *Daubert*[.]’ ” *McGrady*, 368 N.C. at 886, ___ S.E.2d at ___ (quoting *Howerton*, 358 N.C. at 464, 597 S.E.2d at 690). “The proper

1. The *McGrady* Court specifically acknowledged the following United States Supreme Court opinions as describing the exacting standards of reliability expert opinion testimony must meet under Federal Rule 702(a): *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136, 139 L. Ed. 2d 508 (1997); and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 143 L. Ed. 2d 238 (1999). *McGrady*, 368 N.C. at 884–85, ___ S.E.2d at ___ (citing *Weisgram v. Marley Co.*, 528 U.S. 440, 455 (2000)).

2. “Federal courts traditionally grant a great deal of discretion to the trial court in determining the admissibility of expert testimony under *Daubert*.” *State v. Turbyfill*, ___ N.C. App. ___, ___, 776 S.E.2d 249, 253 (citations and quotation marks omitted), *review denied*, ___ N.C. ___, 780 S.E.2d 560 (2015).

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interpretation of Rule 702(a) remains an issue of state law[,]” and “[o]ur previous cases are still good law if they do not conflict with the *Daubert* standard.” *Id.* at 888, ___ S.E.2d at ___.

“The qualification of a witness to give an opinion as one skilled, or, as it is usually termed, *an expert*, depends on matters of fact[,] and the question is addressed to the trial judge, with opportunity to the objector to test the experience of the witness by appropriate examination.” *State v. Smith*, 221 N.C. 278, 288–89, 20 S.E.2d 313, 319–20 (1942) (emphasis added) (citations omitted). “In *Daubert*, [the United States Supreme Court] held that . . . [Rule] 702 imposes a special obligation upon a trial judge to ‘ensure that any and all scientific testimony . . . is not only relevant, but reliable.’” *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147, 143 L. Ed. 2d 238, 249 (1999) (quoting *Daubert*, 509 U.S. at 589, 125 L. Ed. 2d 469).³ This *gatekeeper* role also applies where an expert relies “on skill- or experienced-based observation” *Id.* at 151, 143 L. Ed. 2d at 252 (citation omitted). In his concurring opinion, Justice Scalia wrote, “[the] trial-court discretion in choosing the manner of testing expert reliability—is not discretion to abandon the gatekeeping function.” *Id.* at 158–59, 143 L. Ed. 2d at 256 (Scalia, J., concurring). “[Yet,] the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable.” *Id.* at 152, 143 L. Ed. 2d at 252.

3. A previous panel of this Court set out the *Daubert* factors a trial court may consider in determining whether scientific testimony was reliable, as follows:

In the context of scientific testimony, *Daubert* articulated five factors from a nonexhaustive list that can have a bearing on reliability: (1) “whether a theory or technique . . . can be (and has been) tested”; (2) “whether the theory or technique has been subjected to peer review and publication”; (3) the theory or technique’s “known or potential rate of error”; (4) “the existence and maintenance of standards controlling the technique’s operation”; and (5) whether the theory or technique has achieved “general acceptance” in its field. *Daubert*, 509 U.S. at 593–94, 113 S.Ct. 2786. When a trial court considers testimony based on “technical or other specialized knowledge,” N.C. R. Evid. 702(a), it should likewise focus on the reliability of that testimony, *Kumho*, 526 U.S. at 147–49, 119 S.Ct. 1167. The trial court should consider the factors articulated in *Daubert* when “they are reasonable measures of the reliability of expert testimony.” *Id.* at 152, 119 S.Ct. 1167. Those factors are part of a “flexible” inquiry, *Daubert*, 509 U.S. at 594, 113 S.Ct. 2786, so they do not form “a definitive checklist or test,” *id.* at 593, 113 S.Ct. 2786. And the trial court is free to consider other factors that may help assess reliability given “the nature of the issue, the expert’s particular expertise, and the subject of his testimony.” *Kumho*, 526 U.S. at 150, 119 S.Ct. 1167.

State v. Abrams, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___ (2016) (No. COA15-1144).

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Otherwise, the trial judge would lack the discretionary authority needed both to avoid unnecessary ‘reliability’ proceedings in ordinary cases where the reliability of an expert’s methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert’s reliability arises.

Id. at 152, 143 L. Ed. 2d at 253.

We now consider whether an unpreserved challenge to the performance of a trial court’s gatekeeping function is subject to plain error review in North Carolina.

Pursuant to our Rules of Appellate Procedure,

[i]n criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C. R. App. P. 10(a)(4) (2016); *see also State v. Lawrence*, 365 N.C. 506, 515, 723 S.E.2d 326, 332 (2012) (“Federal plain error review is applied to criminal cases in ‘exceptional circumstances.’ ” (citing *United States v. Atkinson*, 297 U.S. 157, 160, 56 S. Ct. 391, 392 (1936))). “Furthermore, plain error review in North Carolina is normally limited to instructional and evidentiary error.” *Lawrence*, 365 N.C. at 516, 723 S.E.2d at 333 (citation omitted); *see also id.* (“Like federal plain error review, the North Carolina plain error standard of review applies only when the alleged error is unpreserved, and it requires the defendant to bear the heavier burden of showing that the error rises to the level of plain error.”). In both federal court and North Carolina state court, the unchallenged admission of opinion testimony on a subject requiring specialized knowledge by persons not admitted as experts may be reviewed for plain error. *See United States v. Diaz*, 300 F.3d 66, 74 (1st Cir. 2002) (“The consequence of a party’s failure to make a timely objection to the admission of expert testimony is plain error review”); *State v. Maready*, 205 N.C. App. 1, 17, 695 S.E.2d 771, 782 (2010) (reviewing for plain error the unchallenged admission of opinion testimony regarding the cause of an accident by persons not admitted as experts in accident reconstruction). Thus, an unpreserved challenge to the performance of a trial court’s gatekeeping function in admitting opinion testimony in a criminal trial is subject to plain error review in North Carolina state courts.

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For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury’s finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

Lawrence, 365 N.C. at 518, 723 S.E.2d at 334 (citations and quotation marks omitted).

Here, defendant contends that the trial court committed plain error by failing to perform its gatekeeping function in accordance with the *Daubert* standard to determine if Investigator Gullie was qualified to provide opinion testimony as an expert in fire investigation before allowing Investigator Gullie to testify to his opinion that the fire was intentionally set. But before we further address defendant’s argument, we note defendant’s challenge raises some interesting issues.

In challenging the trial court’s performance of its gatekeeping function for plain error, defendant implicitly asks this Court to hold the trial court’s failure to *sua sponte* render a ruling that Investigator Gullie was qualified to testify as an expert pursuant to Rule 702 amounted to error. And to accept defendant’s premise would impose upon this Court the task of determining from a cold record whether Investigator Gullie’s opinion testimony *required* that he be qualified as an expert in fire investigation, where neither the State nor defendant respectively sought to proffer Investigator Gullie as an expert or challenge his opinion before the trial court.

“[W]e can envision few, if any, cases in which an appellate court would venture to superimpose a *Daubert* ruling on a cold, poorly developed record when neither the parties nor the nisi prius court has had a meaningful opportunity to mull the question.” *Cortés-Irizarry v. Corporación Insular de Seguros*, 111 F.3d 184, 189 (1st Cir. 1997) (as quoted by *Diaz*, 300 F.3d at 74). While “[Rule] 702 imposes a special obligation upon a trial judge to ensure that any and all scientific testimony . . . is not only relevant, but reliable,” *Kumho Tire Co.*, 526 U.S. at 147, 143 L. Ed. 2d at 249 (citation and quotation marks omitted), “*Daubert* did not work a seachange [sic] over . . . evidence law, and the trial court’s role as gatekeeper is not intended to serve as a replacement for the adversary

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system.” Fed. R. Evid. 702 (2012) (Advisory Committee notes) (citation and quotation marks omitted).

[As to expert testimony governed by Rule 702,] [t]he trial court must have the same kind of latitude in deciding *how* to test an expert’s reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides *whether* that expert’s relevant testimony is reliable. . . . Otherwise, the trial judge would lack the discretionary authority needed both to avoid unnecessary ‘reliability’ proceedings in ordinary cases where the reliability of an expert’s methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases

Kumho Tire Co., 526 U.S. at 152, 143 L. Ed. 2d at 253.

The record before us reflects that Investigator Gullie introduced himself as employed by the Fire Prevention Bureau, Fire Marshal’s Office in the City of Durham Fire Department. “I have to do fire inspections as it relates to construction or fire inspection for safety inspections, and then I have to do fire investigations as well.” Investigator Gullie further testified that he was the lead fire investigator at the scene on 30 May 2013. Following his introduction, Investigator Gullie testified without objection to his observations of the scene on 30 May 2013, as follows: that the fire appeared to have multiple points of origin; that shallow “crocodiling” of the wood suggested the wood burned fast and hot; and that there was an odor of a flammable liquid. Investigator Gullie testified that “[t]hat’s typically a sign that accelerants were used to accelerate the fire.” Investigator Gullie was neither tendered nor admitted as an expert in the field of fire investigation.

It may be that the trial court acted within the latitude afforded by its discretionary authority to determine that Investigator Gullie’s testimony was of an ordinary type and a reliability proceeding was not necessary, as, by virtue of his position as a fire investigator, the reliability of his testimony that accelerants were used to accelerate the fire was properly taken for granted. *See id.* But even if we presumed for the sake of argument that defendant established error, defendant cannot establish *plain* error.

Aside from the testimony of Investigator Gullie, there was other direct and circumstantial evidence that an accelerant was used to start

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the fire. Officer Barr gave the following testimony while video surveillance recordings made around the time of the fire were played for the jury:

A. . . . You'll see a shadowy figure coming right here walking, a short stature; looks like a little something in the left hand, a little shiny and disappears, and it'll be three or four minutes; and then, you'll see the figure walk off, and then you'll see a flash of light after that

. . .

You'll see a flash that is consistent with what I know to be fire.

. . .

That's consistent with a rapid expansion of a flammable liquid or something like that, and now you have active burning going on.

. . .

Q. Now, Investigator Barr, I'm going to turn your attention to yet a third camera angle. . . .

. . .

Q. And what is that flashed light we just saw?

A. That would be the ignition of the fire on that building. It indicates that it was just a rapid acceleration of a fire indicating that an accelerant was used.

Later, Officer Barr testified that prior to working for the Durham Police Department, he was employed by the Durham City Fire Department. "I worked there for 18 years, so I have multiple certifications in the investigation of fires, hazardous material, technician specialists; hundreds and hundreds of hours of training, and hands-on and life experience in fire training, and some college in the background of fire investigations."

Officer Barr also testified without objection about his interview with Makara, who had called 9-1-1 on 30 May 2013 to report the fire.

A. She said she was outside her apartment that morning.

. . .

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- Q. Did she say what else she noticed about that time?
- A. She said while they were outside, she noticed a smell of gasoline. Then, there was an explosion, and then the fire consumed the building and she called 911.

Thus, given the unchallenged evidence in the form of direct testimony and video recordings depicting that an accelerant was used to start or accelerate the fire, we hold defendant has failed to demonstrate that any presumed error in the trial court's performance of its gatekeeping function would have had a probable impact on the jury's guilty verdict. *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334; *see generally Maready*, 205 N.C. App. at 17, 695 S.E.2d at 782. Accordingly, defendant has failed to demonstrate plain error, and this argument is overruled.

III

[3] Defendant argues he received ineffective assistance of counsel because his attorney (1) did not object to Investigator Gullie's testimony and (2) failed to renew the motion to dismiss at the close of all the evidence. Defendant argues those decisions were not strategic decisions but instead were errors that amounted to constitutionally deficient performance. Defendant then argues that if counsel had objected to the testimony and renewed the motion to dismiss, he would have either been acquitted or had a better case on appeal. We disagree.

Defense counsel is given wide latitude in matters of strategy, so "the burden to show that counsel's performance fell short of the required standard is a heavy one for defendant to bear." *State v. Campbell*, 359 N.C. 644, 690, 617 S.E.2d 1, 30 (2005) (citation and quotation marks omitted). There is a two-part test for succeeding on an ineffective counsel challenge:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Prejudice is established by showing that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

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Id. at 690, 617 S.E.2d at 29–30 (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984)) (quotation marks omitted). Courts generally do not second-guess trial counsel unless the counsel's actions were unreasonable "considering the totality of the circumstances at the time of performance." See *State v. Hill*, 179 N.C. App. 1, 27, 632 S.E.2d 777, 793 (2006). "[J]udicial review of counsel's performance must be highly deferential." *Id.* (citation and quotation marks omitted). There is a strong presumption that counsel's performance was reasonable and acceptable. *Campbell*, 359 N.C. at 690, 617 S.E.2d at 30.

Failure to object to Investigator Gullie's testimony

Defendant's first contention is that his counsel provided deficient performance when it failed to object to the expert opinion testimony of Investigator Gullie. Defendant argues its counsel made a critical error by not objecting and moving the trial court to examine Investigator Gullie under Rule 702, pursuant to the *Daubert* standard. This argument fails the test set out in *Strickland* and adopted in *Campbell*.

First, defendant's theory at trial did not challenge whether the fire was intentionally set but rather whether the State proved beyond a reasonable doubt that defendant was the perpetrator. Thus, the identity of the perpetrator was defendant's main defense. This is evidenced by defendant's closing argument, which is almost exclusively about the identity of the offender. It appears trial counsel made a reasonable, strategic decision to not object to Investigator Gullie's testimony while advocating that defendant was not the perpetrator. Further, the substantial evidence that an accelerant was used to accelerate the spread of the fire could have reasonably been seen as a greater legal challenge to overcome than the identity of the perpetrator. Judicial review is highly deferential to trial counsel's strategic decisions, and we presume such decisions were reasonable. See *State v. Allen*, 233 N.C. App. 507, 510, 756 S.E.2d 852, 856 (2014) ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" (quoting *Strickland*, 466 U.S. at 689, 80 L.Ed.2d at 689) (emphasis added)). There is nothing to suggest this decision was erroneous such that defendant's counsel provided unconstitutionally deficient performance. Thus, this argument is overruled.

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Failure to move to dismiss the charge at the close of all evidence

Defendant's second contention is that his trial counsel provided deficient performance when she failed to move to dismiss the charge against defendant at the close of all of the evidence. Defendant argues there is no legitimate reason for failing to move to dismiss at that time, and had counsel made the motion, defendant could have preserved a sufficiency of the evidence issue for appeal.

A properly preserved appeal of a denial of a motion to dismiss for insufficient evidence is reviewed *de novo*. *State v. Curry*, 203 N.C. App. 375, 392, 692 S.E.2d 129, 142 (2010). If substantial evidence supports a finding that the defendant committed the offense, the motion to dismiss should be denied so that the case can go before a jury. *Id.* Evidence is viewed in the light most favorable to the State, and the State is given the benefit of every reasonable inference. *Id.* at 391–92, 692 S.E.2d at 141; *see also State v. Fritsch*, 351 N.C. 373, 379, 526 S.E.2d 451, 455 (2000) (“[T]he defendant’s evidence should be disregarded unless it is favorable to the State or does not conflict with the State’s evidence.” (citation omitted)).

However, again, defendant cannot establish prejudice. Had defense counsel presented a motion to dismiss at the close of all evidence, the trial court could have considered the evidence in the light most favorable to the State, leaving any contradictions in the evidence for the jury. *State v. Allen*, 233 N.C. App. 507, 512, 756 S.E.2d 852, 857–58 (2014) (“In weighing the sufficiency of the evidence, the trial court considers all evidence admitted at trial, whether competent or incompetent: . . . in the light most favorable to the State, giving the State the benefit of every reasonable inference that might be drawn therefrom. Any contradictions or discrepancies in the evidence are for resolution by the jury.” (citation omitted)). The only evidence defendant proffered after the close of the State’s evidence was the testimony of defendant’s grandmother, who testified that defendant spent the night of 29 to 30 May with her. This evidence stood in near direct contradiction to Makara’s testimony that defendant was driving the vehicle seen leaving the scene shortly after the fire started in the early morning hours of 30 May 2013. And because the court would have been required to leave contradictions and discrepancies in the evidence for the jury to resolve, a motion to dismiss following the close of the evidence would have been denied. *See id.* Therefore, defendant cannot establish prejudice in trial counsel’s failure to move to dismiss the charge of burning certain buildings at the close of all the evidence. Accordingly, defendant’s ineffective assistance of counsel argument is overruled.

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IV

[4] In his final issue on appeal, defendant argues the trial court erred by ordering him to pay \$5,000 in restitution to Lynnhaven Apartments. Defendant argues there was no evidence to support the award. We agree; therefore, we vacate and remand the restitution order.

Even absent an objection, awards of restitution are reviewed *de novo*. *State v. McNeil*, 209 N.C. App. 654, 667, 707 S.E.2d 674, 684 (2011). A trial court can “require that the defendant make restitution to the victim or the victim’s estate for any injuries or damages arising directly and proximately out of the offense committed by the defendant.” N.C. Gen. Stat. § 15A-1340.34(b) (2015). The amount of restitution awarded “must be supported by evidence adduced at trial or at sentencing.” *State v. Moore*, 365 N.C. 283, 285, 715 S.E.2d 847, 849 (2011) (citation and quotation marks omitted). “[A] restitution worksheet, unsupported by testimony or documentation, is insufficient to support an order of restitution.” *Id.* Unsworn statements of a prosecutor also cannot support an order of restitution. *McNeil*, 209 N.C. App. at 668, 707 S.E.2d at 684. When no evidence supports the award, the award of restitution will be vacated. *Moore*, 365 N.C. at 285, 715 S.E.2d at 849. If there is specific testimony or documentation to support the award, the award will be affirmed. *Id.* “[T]he quantum of evidence needed to support a restitution award is not high.” *Id.* When a restitution award is vacated, the typical remedy is to remand the restitution portion of the sentence for a new sentencing hearing. *See McNeil*, 209 N.C. App. at 668, 707 S.E.2d at 684–85 (remanding when there was evidence of physical damage to a victim’s property but no evidence as to the appropriate amount of restitution).

The trial court awarded restitution of \$5,000 because the State prosecutor told the trial court that is how much Lynnhaven Apartments had to pay as an insurance deductible. This is an unsworn statement by the prosecutor that cannot support an award of restitution. The State concedes there is no other specific detail in the record supporting the \$5,000 award. There is evidence of substantial damage to the office building, but like the evidence in *McNeil*, that does not speak to the appropriate amount of restitution. Accordingly, we find the restitution awarded is not supported by the evidence adduced at trial or sentencing. We vacate the \$5,000 award and, accordingly, remand for a new restitution hearing.

NO ERROR IN PART; VACATED AND REMANDED IN PART.

Judges TYSON and INMAN concur.

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[250 N.C. App. 254 (2016)]

STATE OF NORTH CAROLINA

v.

STEPHEN LAMONT WARD

No. COA16-52

Filed 1 November 2016

1. Constitutional Law—right to counsel—trial strategy—impasse

The trial court did not err in a statutory rape and indecent liberties with a child case by settling an impasse between defendant and defense counsel. Defense counsel's trial strategy determined whether a witness would be cross-examined despite defendant's objection to counsel's strategy.

2. Rape—statutory rape—requested jury instructions—mistake of age—consent

The trial court did not err in a statutory rape and indecent liberties with a child case by denying defendant's request for a jury instruction for mistake of age or consent as defenses. Neither instruction is a defense to statutory rape.

Appeal by defendant from judgment entered 29 April 2015 by Judge Robert T. Sumner in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 August 2016.

Attorney General Roy Cooper, by Assistant Attorney General Jill A. Bryan, for the State.

Tarlton Law PLLC, by Raymond C. Tarlton, for defendant-appellant.

BRYANT, Judge.

Where defendant and defense counsel reached an impasse as to whether to cross-examine the State's witness on an issue of sample contamination, we affirm the trial court's ruling that it would be improper for the attorney to pursue a frivolous line of questioning. And where, as defendant concedes, our laws do not support a jury instruction for mistake of age or consent on facts such as these, we overrule defendant's argument.

On 15 July 2013, a Mecklenburg County grand jury indicted defendant Stephen Lamont Ward on two counts of statutory rape of a person thirteen, fourteen, or fifteen years old and two counts of taking indecent

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liberties with a child. These matters were brought to trial during the 28 April 2015 Criminal Session of Mecklenburg County Superior Court, the Honorable Robert T. Sumner, Judge presiding.

At trial, the evidence tended to show that in June 2013, fourteen-year-old Rebecca^{1,2} a Mecklenburg County resident, received a message via the social networking site Facebook inviting her to apply for a modeling opportunity with Fourth Ward Foto. At trial, Rebecca identified defendant as the person in the profile picture for the webpage. Rebecca corresponded with defendant by messages sent via Facebook and by phone for two days, and then agreed to meet him. On 28 June 2013, after her stepfather dropped her off at a library, Rebecca walked to meet defendant at a local pizzeria.

Q. What did you think you were meeting him to do?

A. Just take pictures, you know, what models do, just things like that. Like, you know, face shots and all that kind of stuff.

Rebecca got into defendant's black Durango SUV and traveled with him to a motel on Nations Ford Road. Defendant had not previously told Rebecca he was taking her to a motel. Rebecca testified that *en route*, defendant stopped at a gas station and purchased two cigars and a grape juice drink. Once in his motel room, Rebecca and defendant talked while she drank grape juice, which defendant later told her contained vodka. Defendant undressed Rebecca, kissed and fondled her body, then performed cunnilingus and twice engaged her in sexual intercourse. Afterwards, defendant directed her to pose in various positions for photographs. Rebecca was in defendant's motel room for three to four hours. During that time, her parents' numerous calls to her cell-phone went unanswered.

When defendant returned Rebecca to the library, she contacted her parents and, over the course of the night, eventually disclosed where she had been. The next day, Rebecca directed her parents to the motel where defendant had taken her, and there, Rebecca's mother and step father confronted defendant. Rebecca was then taken to Novant Health, a hospital, and her parents reported to law enforcement officers in the Charlotte Mecklenburg County Police Department that their daughter

1. Rebecca was sixteen at the time of trial.

2. A pseudonym has been used to protect the juvenile's identity.

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had been kidnapped and sexually assaulted. Officer David Wright was among the officers that arrived at the motel to investigate.

Officer Wright testified that a search warrant was issued for the room to which Rebecca was taken, as well as for the black Durango SUV in the motel parking lot. In the vehicle, officers found a vehicle registration card, a visa card with defendant's picture on it, and a bottle of Smirnoff Vodka. It was also confirmed that the room Rebecca had been taken to had been rented by defendant.

Following his arrest, defendant was transported to the Charlotte Mecklenburg Police Department. There, he waived his *Miranda* rights and agreed to speak with Officer Wright. Defendant gave his date of birth as 12 October 1972, making him forty years old at the time of his arrest. Defendant stated that he made contact with Rebecca on 28 June 2016 by "face messaging" her through Facebook for the purpose of making arrangements to take her photograph. He met Rebecca at a local restaurant and then drove her to the motel on Nations Ford Road. Defendant stated that Rebecca agreed to take nude pictures for him, and he took fifteen nude or partially nude photographs. But after the confrontation with Rebecca's mother and step-father, he deleted the photos. Defendant denied having sex with Rebecca. After the interview, defendant submitted to a cheek scraping for the collection of his DNA.

At trial, a certified Sexual Assault Nurse Examiner (SANE) with Novant Health testified about her examination of Rebecca. On 29 June 2013, the nurse collected specimen samples from Rebecca for a rape kit and recorded Rebecca's medical history. In testimony admitted for the purpose of corroboration, the SANE nurse testified to the statement Rebecca gave in her medical history regarding the events which brought her to the motel room on 28 June and the conduct that occurred inside. The testimony was substantially similar to Rebecca's trial testimony.

The last witness the State called was a DNA analyst working with the Charlotte Mecklenburg Police Crime Lab. Prior to her testimony, the trial court heard *ex parte* arguments, out of the presence of the jury and the prosecutor, from defendant and his trial counsel to resolve an impasse regarding a proposed line of questioning intended for cross-examination. The trial court ruled in favor of defendant's trial counsel, and the trial resumed.

DNA analyst Aby Moeykens, with the Charlotte Mecklenburg Police Crime Lab, had been a DNA analyst for twelve years and after stating her credentials was accepted without objection as an expert in DNA analysis and forensic DNA analysis. Moeykens testified that she "was asked to

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analyze a buccal standard from [defendant] and . . . [a] buccal standard from [Rebecca], vaginal swabs, external genitalia swabs, crotch with stains from the underpants, . . . [as well as] fingernail swabs.” “[T]he DNA profile obtained from [defendant] matched the major DNA profile obtained from the vaginal swabs.” Moeykins testified that the probability of selecting another individual who would match the DNA profile was “approximately 1 in 2.54 quadrillion.” Moeykens further testified that defendant’s DNA profile matched the DNA profile obtained from sperm cell fractions taken from Rebecca’s external genitalia, as well as her underwear.

Defendant did not present any evidence.

The jury returned guilty verdicts against defendant as charged: two counts of statutory rape; and two counts of indecent liberties with a child. In accordance with the jury verdicts, the trial court entered a consolidated judgment against defendant on the charges of one count of statutory rape and one count of indecent liberties with a child, imposing an active sentence of 240 to 348 months and a second consolidated judgment reflecting the remaining counts of those charges, imposing a sentence of 150 to 240 months, to be served consecutively. Defendant appeals.

On appeal, defendant raises two issues: whether the trial court erred by (I) settling an impasse between defendant and defense counsel in favor of defense counsel; and (II) denying defendant’s request for an instruction on mistake of age as well as consent.

I

[1] Defendant first argues the trial court erred by ruling that defense counsel’s trial strategy determined whether a witness would be cross-examined despite defendant’s objection to counsel’s strategy. Defendant contends that the trial court’s ruling violated his Sixth Amendment right to assistance of counsel and on the evidence presented before the trial court, entitles defendant to a new trial. We disagree.

Standard of review

We note defendant contends that our standard of review is *de novo*, while the State seems to argue the standard is abuse of discretion. As defendant raises a constitutional issue, we will review the matter *de novo*. *State v. Whitaker*, 201 N.C. App. 190, 192, 689 S.E.2d 395, 396 (2009) (“The standard of review for questions concerning constitutional rights is *de novo*.” (citation and quotation marks omitted)), *aff’d*, 364 N.C. 404, 700 S.E.2d 215 (2010).

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Analysis

In our review of the issue, we find guidance from our Supreme Court in *State v. Ali*, 329 N.C. 394, 407 S.E.2d 183 (1991). At trial, the defendant and his trial counsel reached an impasse during jury voir dire. Namely, the defendant wanted to accept a juror that counsel recommended be excused. *Ali*, 329 N.C. at 402, 407 S.E.2d at 188–89. Out of the presence of the jury and for the record, trial counsel noted his exception to the juror, but speaking for the defendant, accepted the juror. *Id.* at 402, 407 S.E.2d at 188–89. Following his conviction, the defendant appealed, arguing that his trial counsel should have made the final determination as to whether the juror would be accepted, and that trial counsel’s failure to make that determination deprived the defendant of his Sixth Amendment right to counsel. *Id.* Our Supreme Court noted that “[t]he attorney-client relationship ‘rests on principles of agency, and not guardian and ward.’ ” *Id.* at 403, 407 S.E.2d at 189 (quoting *State v. Barley*, 240 N.C. 253, 255, 81 S.E.2d 772, 773 (1954)). The *Ali* Court acknowledged the prior holding of this Court while clarifying the duty of an attorney who reaches an impasse with the client, as to tactical trial strategy.

[T]actical decisions, such as which witnesses to call, “whether and how to conduct cross-examinations, what jurors to accept or strike, and what trial motions to make are ultimately the province of the lawyer” *State v. Luker*, 65 N.C. App. 644, 649, 310 S.E.2d 63, 66 (1983), *aff’d as to error; rev’d as to harmlessness of error*, 311 N.C. 301, 316 S.E.2d 309 (1984). However, when counsel and a fully informed criminal defendant client reach an absolute impasse as to such tactical decisions, the client’s wishes must control; this rule is in accord with the principal-agent nature of the attorney-client relationship.

Id. at 404, 407 S.E.2d at 189 (alteration in original). In such a conflict, the *Ali* Court recommended that the attorney make a record of the circumstances, her advice to the defendant, her reasons for the advice, the defendant’s decision, and the conclusion reached. *Id.*; accord *State v. Floyd*, 238 N.C. App. 110, 125–26, 766 S.E.2d 361, 372–73 (2014) (holding the defendant was entitled to a new trial where an impasse was reached between the defendant and his trial counsel as to the extent of cross-examination, the trial court failed to inquire into the nature of the impasse or rule on the dispute, and on appeal, the State failed to assert that the violation was harmless error), *review allowed, writ allowed*, ___ N.C. ___, 771 S.E.2d 295 (2015).

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Given this procedure, we note that this Court has held that despite a conflict, trial counsel is *not compelled* to pursue strategy or tactical decisions based on frivolous or unsupported claims.

[The] [d]efendant in this case sought to have his attorneys follow instructions to present claims that they felt “ha[d] no merit.” Thus, the impasse was not over “tactical decisions,” but rather over whether [the] Defendant could compel his counsel to file frivolous motions and assert theories that lacked any basis in fact. Nothing in *Ali* or our Sixth Amendment jurisprudence requires an attorney to comply with a client’s request to assert frivolous or unsupported claims. In fact, to do so would be a violation of an attorney’s professional ethics: “A lawyer *shall not* bring or defend a proceeding, or assert or controvert an issue therein, *unless* there is a *basis in law or fact* for doing so that is *not frivolous* . . . [.]” N.C. St. B. Rev. R. Prof. Conduct 3.1 (emphasis added).

State v. Jones, 220 N.C. App. 392, 395, 725 S.E.2d 415, 417 (2012) (alteration in original).

Here, we consider whether defendant’s direction to his trial counsel to cross-examine the State’s DNA expert on the extent of a mold contamination in the testing laboratory amounted to a tactical decision or a frivolous act.

[Defense Counsel]: What the issue is in this case, the State is going to be calling a DNA expert on this matter and that expert’s going to be testifying to the results of some laboratory tests that were performed in the Charlotte Mecklenburg Police Department laboratory. As part of the Discovery, the State disclosed that there had been contamination of a freezer in the laboratory with mold and that mold was found in the vicinity of and apparently on some DNA samples. They took quality control steps to determine whether there was actual contamination and they did not find any and they informed the effected [sic] parties, the defense counsel, of the contamination issue.

. . .

Normally saying that there could be errors is not relevant unless you have evidence of errors. Now, in this case something did happen, but it is my concern that there is

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nothing from what I see of the DNA electropherogram, the actual results, to indicate that there was any damage in this case. And by the way, if DNA is degraded there is a characteristic pattern that appears, it's called a ski slope, and [I] did not see that. The larger pieces of DNA are going to get damaged first, we don't see that in this case. So it's not just that the results were there, the normal signs of degradation aren't even there. . . .

. . .

THE COURT: . . . Now, does your client care to be heard with regard to this?

THE DEFENDANT: Your Honor, my question was basically surrounding the fact that they had to prove their case beyond a reasonable doubt and I feel like if there is any doubt surrounding the DNA then that should be heard by the jury. . . .

Denying defendant's request to compel his trial counsel to examine the State's DNA expert regarding the contamination reported in the lab's freezer, the trial court made the following remark: "[Defense counsel] has an obligation not to – as he indicated, I think I've alluded to and I certainly agree with him, that raising an issue that is not an issue just when you know it's not an issue is improper." This reasoning and ruling by the trial court in the instant case is in line with the Court's reasoning in *Jones*. 220 N.C. App. at 395, 725 S.E.2d at 417 ("Nothing in *Ali* or our Sixth Amendment jurisprudence requires an attorney to comply with a client's request to assert frivolous or unsupported claims. In fact, to do so would be a violation of an attorney's professional ethics[.]").

On the record before us, it appears that the proposed challenge to the DNA analysis performed by the Charlotte Mecklenburg Police Crime Lab on the basis of contamination was not a challenge rooted in relevant facts. Rather, the matter was properly considered one which is governed by rules of professional ethics for attorneys. The trial court properly denied defendant's request to compel trial counsel to pursue a line of questioning to elicit irrelevant facts. *See id.* Accordingly, defendant's argument is overruled.

Moreover, even were we to presume the trial court erred by failing to instruct defense counsel to cross-examine the State's forensic DNA expert in the manner directed by defendant, such error would be harmless in light of the other overwhelming evidence of defendant's guilt.

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“A violation of the defendant’s rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless.” N.C. Gen. Stat. § 15A-1443(b) (2015). “This Court has previously applied harmless error analysis to constitutional errors arising under Article I, Section 24[, Right of jury trial in criminal cases].” *State v. Bunch*, 363 N.C. 841, 845, 689 S.E.2d 866, 869 (2010). “On a general level, an error is harmless beyond a reasonable doubt if it did not contribute to the defendant’s conviction. The presence of overwhelming evidence of guilt may render error of constitutional dimension harmless beyond a reasonable doubt.” *Id.* at 845–46, 689 S.E.2d at 869 (citation, quotation marks, and brackets omitted).

In its brief to this Court, the State argues there was overwhelming evidence of defendant’s guilt on the charges of indecent liberties and statutory rape sufficient to render harmless beyond a reasonable doubt any potential violation of defendant’s right to counsel. We agree.

The evidence presented at trial included defendant’s handwritten statement to a Charlotte Mecklenburg Police Officer admitting that he was born in 1972; that, on 28 June 2016, he met Rebecca at a local restaurant, then drove her to a motel on Nations Ford Road; and that he took at least fifteen nude and partially nude pictures of Rebecca. Rebecca was born in 1998 and was fourteen years of age on 28 June 2016. Her testimony, describing how she met defendant and many of the events occurring on 28 June, was consistent with defendant’s statement. Additionally, Rebecca testified that defendant provided her with grape juice mixed with vodka. A bottle of Smirnoff Vodka was recovered from defendant’s black Durango SUV, parked in the motel parking lot on Nations Ford Road. Rebecca testified that after providing her with the grape juice and vodka, defendant undressed her, kissed and fondled her body, performed cunnilingus, and had sexual intercourse with her two times. Rebecca testified that defendant told her he ejaculated during sexual intercourse.

Q. Did you -- when you were 14, did you know what ejaculated meant?

A. No.

...

Q. Did you use that green washcloth to wash yourself?

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A. I did.

Q. Did you see anything on the washcloth?

A. It was like a little bit of blood and some white, whitish clearish stuff on there.

Rebecca testified that she was in defendant's motel room for three to four hours. The next day, Rebecca was taken to Novant Health where her clothes were collected and specimen swabs were taken from her body. The SANE nurse, who collected evidence from Rebecca took a history from Rebecca during the examination. The nurse testified to the history Rebecca provided detailing the events which had occurred, including two separate acts of sexual intercourse, cunnilingus, and having nude photographs taken. The nurse corroborated that Rebecca's underwear were collected and that the nurse took external and internal swabs of Rebecca's vagina for the rape kit. A criminalist with the Charlotte Mecklenburg Police Department testified extensively regarding the scientific testing she performed on physical evidence collected in the rape kit from which she found the presence of sperm and saliva on vaginal swabs taken from Rebecca's body.

The DNA analyst compared the DNA profile from Rebecca to defendant's DNA profile and determined that the DNA profile obtained from defendant matched the DNA profile obtained from the vaginal swabs, as well as external genitalia swabs, taken from Rebecca. The analyst further testified that the statistical calculation on the match from the vaginal swab and from the external genitalia swabs was the same—1 in 2.54 quadrillion.

We note that even if on cross-examination of the forensic DNA expert, defense counsel had challenged the integrity of the DNA sample on the basis of contamination, the DNA evidence would have still been admissible, as such challenges go to the weight, not the admissibility, of the evidence. *See State v. Pennington*, 327 N.C. 89, 101, 393 S.E.2d 847, 854 (1990) ("The admissibility of any such [DNA] evidence remains subject to attack. . . . [T]raditional challenges to the admissibility of evidence such as the contamination of the sample . . . may be presented. These issues relate to the weight of the evidence."). Defendant did not present any evidence that the DNA samples tested in his case were contaminated.

Even presuming the trial court's failure to resolve the impasse between trial counsel and defendant in defendant's favor amounted to a violation of defendant's Sixth Amendment right to counsel, the other

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overwhelming evidence of defendant's guilt on the two counts of statutory rape of a person thirteen, fourteen, or fifteen years old and two counts of taking indecent liberties with a child would render even the constitutional error harmless beyond a reasonable doubt. *See Bunch*, 363 N.C. at 845–46, 689 S.E.2d at 869 (“[T]he presence of overwhelming evidence of guilt may render error of constitutional dimension harmless beyond a reasonable doubt.” (citation and quotation marks omitted)). Accordingly, defendant's argument is overruled.

II

[2] Next, defendant argues that the trial court erred by denying his request for instructions on “mistake of age” and consent as defenses. Despite this argument, defendant acknowledges the precedent of this Court to the contrary, *see State v. Anthony*, 351 N.C. 611, 616, 528 S.E.2d 321, 323 (2000) (“Where the age of the victim is an essential element of the crime of rape, as in N.C.G.S. § 14–27.2(a)(1) and its predecessor statute N.C.G.S. § 14–21, the result is a strict liability offense . . . [:] Consent is no defense[.]” (citation and quotation marks omitted)); *State v. Browning*, 177 N.C. App. 487, 491–92, 629 S.E.2d 299, 303 (2006) (“Statutory rape, under N.C.G.S. § 14–27.7A is a strict liability crime. Criminal *mens rea* is not an element of statutory rape. . . . [A] mistake of fact is no defense to statutory rape.” (citations and quotation marks omitted)); *State v. Sines*, 158 N.C. App. 79, 86, 579 S.E.2d 895, 900 (2003) (“The defendant was not required to have knowledge that the victim was under the age of consent in order to be convicted of attempted rape of a child.” (citation omitted)). Defendant submits this argument simply to preserve the argument should the law allow for such defenses in the future. Accordingly, we do not further consider this argument.

NO ERROR.

Judges TYSON and INMAN concur.

SWAPS, LLC v. ASL PROPS., INC.

[250 N.C. App. 264 (2016)]

SWAPS, LLC, PLAINTIFF

v.

ASL PROPERTIES, INC., THE HEYWARD GROUP D/B/A THE HEYWARD COMPANIES
AND VIRGINIA E. FAVREAU, DEFENDANTS

No. COA16-443

Filed 1 November 2016

Declaratory Judgments—North Carolina Uniform Declaratory Judgment Act—no award of attorney fees

The trial court's order awarding attorney fees under the Declaratory Judgment Act was vacated. The North Carolina Uniform Declaratory Judgment Act does not permit a trial court to award attorney fees.

Appeal by defendants from order entered 11 December 2015 by Judge W. Erwin Spainhour in Union County Superior Court. Heard in the Court of Appeals 22 September 2016.

Koy E. Dawkins for plaintiff-appellee.

Raynor Law Firm, PLLC, by Kenneth R. Raynor, for defendants-appellants.

DIETZ, Judge.

The issue presented in this appeal is whether the North Carolina Uniform Declaratory Judgment Act permits a trial court to award attorneys' fees. We hold that it does not.

The act states that "the court may make such award of costs as may seem equitable and just." N.C. Gen. Stat. § 1-263. Our Supreme Court has held that costs are a creature of statute and are governed solely by statute, not common law.

In the General Statutes, costs and attorneys' fees are separate categories and attorneys' fees may be awarded as part of an award of "costs" only where the authorizing statute expressly permits it. The Declaratory Judgment Act does not. Accordingly, we vacate the trial court's order awarding attorneys' fees under the Declaratory Judgment Act.

Facts and Procedural History

Plaintiff Swaps, LLC prevailed on a claim under the North Carolina Uniform Declaratory Judgment Act, N.C. Gen. Stat. § 1-253 *et seq.* Swaps

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later moved for an award of attorneys' fees and costs under N.C. Gen. Stat. § 1-263. The trial court granted the motion and awarded Swaps \$37,300.91 in attorneys' fees and \$677.61 in court costs. Defendants timely appealed.

Analysis

The sole issue in this appeal is whether the Uniform Declaratory Judgment Act permits a trial court to award attorneys' fees. In a section titled "Costs," the act provides that "[i]n any proceeding under this article the court may make such award of costs as may seem equitable and just." N.C. Gen. Stat. § 1-263. The parties dispute whether the term "costs" in Section 1-263 includes attorneys' fees.

"At common law, neither party recovered costs in a civil action and each party paid his own witnesses." *Lassiter ex. rel. Baize v. N.C. Baptist Hosps. Inc.*, 368 N.C. 367, 375, 778 S.E.2d 68, 73 (2015) (quoting *City of Charlotte v. McNeely*, 281 N.C. 684, 691, 190 S.E.2d 179, 185 (1972)). "Today in this State, all costs are given in a court of law by virtue of some statute." *Id.* (brackets omitted). As a result, awards of "costs" to litigants in civil actions "are entirely creatures of legislation, and without this they do not exist." *Id.*

For more than a century, the statutes governing costs generally have excluded attorneys' fees, and our Supreme Court has acknowledged that this was "deliberately adopted as the policy" by our legislature. *Wachovia Bank & Trust Co. v. Schneider*, 235 N.C. 446, 454, 70 S.E.2d 578, 584 (1952). As a result "attorneys' fees are not now regarded as a part of the court costs in this jurisdiction." *Id.*

When the General Assembly intends to depart from this general rule, it always has done so expressly. For example, N.C. Gen. Stat. § 6-21 governs costs in certain civil proceedings and states that "[t]he word 'costs' as the same appears and is used in this section shall be construed to include reasonable attorneys' fees." *See also* N.C. Gen. Stat. §§ 6-21.1 to 6-21.7.

Here, the General Assembly chose only to refer to "costs" in Section 1-263 and not to specify that the term costs includes attorneys' fees. Thus, we hold that N.C. Gen. Stat. § 1-263 does not permit the trial court to award attorneys' fees.

Swaps does not dispute this reasoning or assert any textual argument for why Section 1-263 should be interpreted to include attorneys' fees. But Swaps argues that this Court approved an award of attorneys' fees under Section 1-263 in *Phillips v. Orange Cty. Health Dep't*,

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237 N.C. App. 249, 765 S.E.2d 811 (2014) and that this Court is bound to follow *Phillips*. We disagree.

In *Phillips*, this Court never stated that the word “costs” in Section 1–263 authorized an award of attorneys’ fees, nor did we engage in the analysis that we do here. More importantly, *Phillips* involved a suit against a county, and in this Court’s discussion of attorneys’ fees, we quoted N.C. Gen. Stat. § 6–21.7, which provides that “[i]n any action in which a . . . county is a party, upon a finding by the court that the . . . county acted outside the scope of its legal authority, the court may award reasonable attorneys’ fees and costs to the party who successfully challenged the . . . county’s action.” *Phillips*, 237 N.C. App. at 261, 765 S.E.2d at 820. Thus, *Phillips* involved a case in which a different statute (not N.C. Gen. Stat. § 1–263) expressly authorized the award of attorneys’ fees. Swaps does not identify a similar statute that expressly authorizes attorneys’ fees in this case, and there is none.

Swaps also cites *Heatherly v. State*, 189 N.C. App. 213, 658 S.E.2d 11 (2008), in which the Court affirmed an award of “the costs of this litigation” under Section 1–263. But as in *Phillips*, in *Heatherly* this Court did not analyze the language of Section 1–263 or hold that the word “costs” in Section 1–263 authorized an award of attorneys’ fees. Indeed, the majority opinion does not even mention attorneys’ fees. And, in any event, *Heatherly* later was affirmed by an equally divided Supreme Court in a *per curiam* opinion holding that “the decision of the Court of Appeals is left undistributed without precedential value.” *Heatherly v. State*, 363 N.C. 115, 115, 678 S.E.2d 656, 657 (2009). Thus, we would not be bound by *Heatherly* even if that decision had addressed the issue (which it did not).

Our holding today also aligns our interpretation of the Uniform Declaratory Judgment Act with the overwhelming majority of other jurisdictions to address this issue under their versions of the act. As with other uniform laws, the Uniform Declaratory Judgment Act “shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.” N.C. Gen. Stat. § 1–266.

Other states interpreting this same provision in their own versions of this uniform law have held that the term “costs” does not include attorneys’ fees. See *Nat’l Union Fire Ins. Co. of Pittsburgh, P.A. v. Dixon*, 112 P.3d 825, 830 (Idaho 2005) (holding Idaho UDJA “does not provide authority to award attorney fees in a declaratory action”); *Trs. of Ind. Univ. v. Buxbaum*, 69 P.3d 663, 670 (Mont. 2003) (holding Montana UDJA provision allowing court to make award of costs “does not authorize

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an award of attorney fees”); *Pub. Entity Pool v. Score*, 658 N.W.2d 64, 68 (S.D. 2003) (“No provision in the [*sic*] South Dakota’s Declaratory Judgment Act allows for an award of attorney’s fees to the prevailing party.”); *Soundgarden v. Eikenberry*, 871 P.2d 1050, 1064 (Wash. 1994) (“[The Uniform Declaratory Judgment Act] provides that ‘[i]n any proceeding under this chapter, the court may make such award of costs as may seem equitable and just.’ But the term ‘costs’ does not include ‘attorney fees’.” (second alteration in original)); *Kremers-Urban Co. v. Am. Emp’rs Ins. Co.*, 351 N.W.2d 156, 168 (Wis. 1984) (“We decline to expand or enlarge the ‘costs’ available in declaratory judgment actions to include attorney’s fees.”). Our interpretation of Section 1-263 aligns our state’s law with these other states’ interpretation of this uniform act.

Finally, Swaps makes a policy argument for the award of attorneys’ fees under N.C. Gen. Stat. § 1-263, asserting that the “recovery of cost and attorney’s fees is of utmost importance to the litigants in a Declaratory Judgment Action” and that, if the trial court has no authority to grant attorneys’ fees under the Declaratory Judgment Act, “why bring the action under the Declaratory Judgment Act?”

The answer, of course, is that the Uniform Declaratory Judgment Act provides a mechanism for parties to have their respective rights and obligations adjudicated where there is a justiciable controversy but no affirmative claim ripe for litigation:

The Act recognizes the need of society for officially stabilizing legal relations by adjudicating disputes before they have ripened into violence and destruction of the status quo. It satisfies this social want by conferring on courts of record authority to enter judgments declaring and establishing the respective rights and obligations of adversary parties in cases of actual controversies without either of the litigants being first compelled to assume the hazard of acting upon his own view of the matter by violating what may afterwards be held to be the other party’s rights or by repudiating what may be subsequently adjudged to be his own obligations.

Lide v. Mears, 231 N.C. 111, 117–18, 56 S.E.2d 404, 409 (1949).

Indeed, Swaps’s policy argument cuts the other way. If litigants could recover attorneys’ fees in declaratory judgment actions, it would create incentives to frame legal disputes in terms of declaratory relief. Particularly in contract or property disputes where the cost of litigation might exceed any monetary recovery, enterprising litigants would

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have tremendous incentives to race to the courthouse with a request for declaratory relief rather than pursuing a traditional, affirmative claim for relief. Nothing in the text of the Uniform Declaratory Judgment Act suggests that the General Assembly wanted to encourage these types of preemptive lawsuits.

In sum, we hold that, because N.C. Gen. Stat. § 1-263 does not expressly include attorneys' fees within the definition of the term "costs," the statute does not permit an award of attorneys' fees.¹

Conclusion

We vacate the trial court's order awarding attorneys' fees under N.C. Gen. Stat. § 1-263.

VACATED.

Judges HUNTER, JR. and McCULLOUGH concur.

1. We also note, to avoid any confusion, that where another statute authorizes an award of attorneys' fees, nothing in N.C. Gen. Stat. § 1-263 prohibits a trial court from awarding those fees in an action brought under the Uniform Declaratory Judgment Act.

VINCOLI v. STATE

[250 N.C. App. 269 (2016)]

JOSEPH VINCOLI, PLAINTIFF

v.

STATE OF NORTH CAROLINA, DEFENDANT

No. COA15-1013

Filed 1 November 2016

Public Officers and Employees—career status achieved—position declared managerial exempt from N.C. Human Resources Act—statutory right to hearing before Office of Administrative Hearings

Where plaintiff was employed by the N.C. Department of Public Safety as a Special Assistant to the Secretary for Inmate Services, attained career status, was notified that the Governor had declared his position as managerial exempt from the provisions of the N.C. Human Resources Act, and two months later received a letter terminating him from employment, the plain language of N.C.G.S. § 126-5(h) provided plaintiff with a statutory right to a hearing before OAH as to whether he was subject to the Act and whether his exempt designation was proper.

Judge DIETZ concurring in a separate opinion.

Appeal by defendant from order entered 9 June 2015 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 9 March 2016.

Law Offices of Michael C. Byrne, by Michael C. Byrne, for plaintiff-appellee.

Attorney General Roy Cooper, by Assistant Attorney General Tamika L. Henderson and Special Deputy Attorney General Joseph Finarelli, for the State.

The McGuinness Law Firm, by J. Michael McGuinness, filed a brief as amicus curiae for the State Employees Association of North Carolina.

CALABRIA, Judge.

Defendant State of North Carolina (“the State”) appeals from an order denying its motion for summary judgment and granting Plaintiff

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Joseph Vincoli's ("Vincoli") motion for summary judgment in a declaratory judgment action initiated by Vincoli. In its order, the trial court declared that the enactment of N.C. Gen. Stat. § 126-34.02, a provision of the North Carolina Human Resources Act ("NCHRA"),¹ was unconstitutional as applied to Vincoli because it did not provide him the right to a contested case hearing before the Office of Administrative Hearings ("OAH") to challenge the designation of his position as "exempt" from the NCHRA. In addition, the trial court's order permanently enjoined the State from enforcing the statute against Vincoli and ordered that the State provide Vincoli with an OAH hearing to review the designation of his position as exempt. Because we conclude that N.C. Gen. Stat. § 126-5(h) does provide for the right to such a hearing, we reverse.

I. Background

In 2010, Vincoli was hired by the North Carolina Department of Public Safety ("DPS") into a position subject to the NCHRA² and subsequently attained the status of a "career State employee." A "career State employee" is afforded certain protections provided by the NCHRA, such as the right not to be disciplined except for just cause. However, the NCHRA also grants the Governor the authority to designate positions within departments of state government, including DPS, as "policymaking" or "managerial" exempt from the provisions of the NCHRA.

Until 2013, a career State employee whose non-exempt position was subsequently designated as exempt was entitled by N.C. Gen. Stat. § 126-34.1(c) to a contested case hearing before OAH to challenge the propriety of the designation. Regarding the process afforded a career state employee aggrieved by an exempt declaration, our Supreme Court has explained:

Contested case hearings are conducted by the Office of Administrative Hearings (OAH) and are heard by an Administrative Law Judge (ALJ). The ALJ makes a recommendation to the Commission, N.C.G.S. § 150B-34 (1995), and the Commission then makes a final decision based upon the record from the OAH, N.C.G.S. § 150B-36 (1995). If the employee or state agency is aggrieved by the Commission's final decision, either party may petition the superior court for judicial review, N.C.G.S. § 150B-43

1. Formerly the State Personnel Act.

2. We recognize that the NCHRA has since been amended but construe the relevant provisions as they existed.

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(1995), as petitioner Powell did in this case. Review is then conducted in accordance with N.C.G.S. § 150B-51(b).

Powell v. N.C. Dep't of Transp., 347 N.C. 614, 616-17, 499 S.E.2d 180, 181 (1998).

On 21 August 2013, the Governor signed into law House Bill 834, which substantially revised the NCHRA. A career state employee's ability to challenge an exempt designation pursuant to the previous process changed with the passage of "An Act Enhancing the Effectiveness and Efficiency of State Government by Modernizing the State's System of Human Resource Management and By Providing Flexibility for Executive Branch Reorganization and Restructuring . . ." 2013 N.C. Sess. Laws, c. 382 ("the Act"). The Act, *inter alia*, amended the "Employee Grievance" section of the NCHRA by repealing N.C. Gen. Stat. § 126-34.1 and replacing it with N.C. Gen. Stat. § 126-34.02, which omitted an employee's action to challenge an exempt designation as grounds for a contested case hearing and, in effect, eliminated a career state employee's opportunity to a contested case hearing before OAH on this issue.

On 1 October 2013, Vincoli, who was employed by DPS as a Special Assistant to the Secretary for Inmate Services and who had attained career status, was notified that the Governor had declared his position as "managerial exempt." Approximately two months later, on 6 December 2013, Vincoli received a letter terminating him from employment on the stated grounds that "a change in agency staff is appropriate at this time[.]"

According to the pleadings in Vincoli's OAH proceeding,³ Vincoli filed an internal grievance with DPS challenging the designation of his position as exempt. In response, Vincoli received a letter from DPS refusing to entertain his grievance on the basis that "he was not eligible for the internal appeal process as a 'managerial exempt' employee." Subsequently, Vincoli filed a grievance in the North Carolina Office of State Human Resources ("OSHR"), which refused to entertain Vincoli's grievance, concluding that: "In this particular case and on these particular facts, OSHR believes that there is no personal or subject matter jurisdiction for any claim by [Vincoli] for a just cause claim against DPS in either the agency grievance process or OAH." As a result, neither DPS nor OSHR issued a final agency decision on the matter.

3. Although the pleadings associated with Vincoli's petition for a contested case hearing before OAH were initially omitted from the record on appeal, we have granted the State's motion to take judicial notice of OAH proceedings.

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On 16 January 2014, Vincoli filed a petition for a contested case hearing with OAH, challenging his exemption and subsequent termination without just cause. Specifically, Vincoli asserted that

his designation as “managerial exempt” was in fact used to disguise a disciplinary dismissal without just cause that would fall within the scope of the State Personnel Act’s protections against dismissal without just cause. [DPS’] action was a sham, pretext exemption designation . . . and constituted a de facto dismissal[.]

In addition, Vincoli asserted that he was entitled to a contested case hearing based on N.C. Gen. Stat. § 126-5(h), which provides: “In case of dispute as to whether an employee is subject to the provisions of this Chapter, [the State Personnel Act,] the dispute shall be resolved as provided in Article 3 of Chapter 150B.” In response, DPS filed a motion to dismiss, asserting that since Vincoli’s position was designated as exempt, he was not entitled to challenge DPS’ decision to terminate him. Additionally, DPS asserted that OAH lacked jurisdiction to determine whether the classification of Vincoli’s position as managerial exempt was proper, on the basis that this issue was not included in N.C. Gen. Stat. § 126-34.02, and “[a]ny issue for which an appeal to OAH has not been specifically authorized cannot be grounds for a contested case hearing.” Vincoli filed a response to DPS’ motion to dismiss, asserting, in pertinent part:

[DPS] takes several pages to state what should be a fairly concise argument: The OAH lacks subject matter jurisdiction because the General Assembly repealed the portion of N.C.G.S. 126-34.1 listing improper exempt designation as appealable. The response is equally concise: while that provision was repealed, 126-5(h), mandating that disputes on whether one is subject to the State Personnel Act “shall be resolved as provided in Article 3 of Chapter 150B,” was not. And, as shown below, it is 126-5, not 126-34.1, which controls whether a state employee is subject to the State Personnel Act. Accordingly, given the appeal right arises under 126-5, and that appeal right remains in force, the OAH has jurisdiction over [] Vincoli’s appeal. . . .

Vincoli asserted that he had

properly invoked the subject matter jurisdiction of the OAH in two separate and specific manners. He has alleged dismissal without just cause under 126-35(a), and has

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likewise alleged a dispute about whether he is subject to the State Personnel Act under N.C.G.S. 126-5(h).

After a hearing, OAH entered an order on 10 April 2014 granting DPS' motion to dismiss for lack of subject matter jurisdiction. In its order, OAH made the following conclusions of law:

1. Effective August 21, 2013, the law changed controlling the matters over which the OAH has original jurisdiction, and the General Assembly repealed the right to appeal an exempt designation. This statutory change removes the rights of a state employee to challenge an exempt designation; therefore, the merits of this contested case will not be addressed.
2. As a managerial exempt employee, [Vincoli] is not subject to the provisions of Chapter 126. Therefore, G.S. 126-5(h) does not grant [Vincoli] the right to appeal his exempt designation or ultimate dismissal under G.S. 126-5(h) and Chapter 150B.
3. Only those grievance listed in G.S. 126-34.02 may be heard as contested cases in the OAH and only after review by the [OSHR]. [Vincoli's] exempt designation is no longer among the grievances listed; therefore, the OAH has no subject matter jurisdiction, which is the predicate authority for a contested case to proceed. The lack of subject matter jurisdiction requires that [Vincoli's] contested case be dismissed.

Vincoli had thirty days to appeal OAH's decision to the Court of Appeals of North Carolina. Vincoli did not timely appeal this order to our Court.

On 29 August 2014, Vincoli filed a complaint and petition for a declaratory judgment action under the North Carolina Uniform Declaratory Judgment Act ("NCUDJA"), N.C. Gen. Stat. § 1-253 to -267, in Wake County Superior Court, challenging the constitutionality of the Act and specifically the enactment of N.C. Gen. Stat. § 126-34.02 as applied to him. In his complaint, Vincoli asserted that the enactment of the challenged statute deprived him of his previously vested property interest in continued employment with the State without any due process or compensation. Specifically, Vincoli asserted that:

[U]pon reaching "career" status, [Vincoli] had a constitutionally protected, fully vested property interest

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with respect to his employment with the State of North Carolina that created a reasonable expectation of continued employment with the State of North Carolina. Prior to the passage of [the Act] and codification of N.C.G.S. § 126-34.02, neither the Governor nor any State agency could have terminated or deprived Plaintiff of his property interest through an “exempt” designation without providing Plaintiff due process of law in the form of a contested case proceedings[.]

Vincoli requested declaratory relief, seeking a declaration that N.C. Gen. Stat. § 126-34.02 is unconstitutional and “such additional and further relief as [the court] deems appropriate.”

On 7 October 2014, the State moved to dismiss Vincoli’s claims, asserting, *inter alia*, that: (1) a career state employee may no longer challenge the designation of his position as exempt in OAH; (2) OAH lacked jurisdiction to entertain Vincoli’s petition for a contested case hearing on the issue of whether his position was properly declared exempt; (3) due to the enactment of N.C. Gen. Stat. § 126-34.02, plaintiff has no cause of action in OAH to determine the propriety of the designation of his previous position as managerial exempt; and (4) OAH issued a decision concluding that, under N.C. Gen. Stat. § 126-34.02, plaintiff had no right to appeal the designation of his former position as managerial exempt. Accordingly, the State requested that the superior court deny Vincoli’s complaint and petition for declaratory judgment as well as all relief sought by Vincoli.

Subsequently, Vincoli and the State filed cross-motions for summary judgment. After a hearing, by order entered 9 June 2015, the trial court granted Vincoli’s summary judgment motion and denied the State’s motion, declaring that N.C. Gen. Stat. § 126-34.02 was an unconstitutional violation of Article I, Section 19 of the North Carolina Constitution as applied to Vincoli. In addition, the trial court permanently enjoined the State from enforcing N.C. Gen. Stat. § 126-34.02 against Vincoli and ordered that Vincoli be provided with a contested case hearing before OAH regarding whether the exempt designation was proper, in accordance with the repealed N.C. Gen. Stat. § 126-34.1(c). The State appeals.⁴

4. In our discretion, we have taken judicial notice of two other OAH proceedings initiated by Vincoli, 14 OSP 00389 and 15 OSP 07944.

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II. Issues

On appeal, the State asserts that the trial court erred by granting summary judgment in favor of Vincoli for three reasons. First, the State contends that the Act did not violate Vincoli's due process rights under Article I, Section 19 of the North Carolina Constitution because (a) the scope of Vincoli's protected property interest in continued employment did not include a right to grieve an exempt designation; and (b) the legislative process satisfied any process that was due as a result of the repeal of N.C. Gen. Stat. § 126-34.1(c). Second, the State contends that repeal of a career state employee's ability to appeal an exempt designation does not give rise to a taking claim pursuant to Article I, Section 19 of the North Carolina Constitution, because (a) Vincoli did not establish a contractual obligation to provide him a hearing to challenge the designation of his position as exempt from the NCHRA; and (b) if the repeal of N.C. Gen. Stat. § 126-34.1(c) is an uncompensated taking, the State has provided just compensation. And third, the State contends that the trial court's order to provide appellee a contested case hearing in OAH violates the separation of powers. Because the dispositive issue in this case renders addressing these issues unnecessary, we decline to address them.

III. Standard of Review

Summary judgment may be granted in a declaratory judgment proceeding, *N.C. Farm Bureau Mut. Ins. Co. v. Briley*, 127 N.C. App. 442, 444, 491 S.E.2d 656, 657 (1997), *disc. rev. denied*, 347 N.C. 577, 500 S.E.2d 82 (1998), where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law," N.C.G.S. § 1A-1, Rule 56(c) (2001).

Williams v. Blue Cross Blue Shield of N.C., 357 N.C. 170, 178, 581 S.E.2d 415, 422 (2003). "Because the parties do not dispute any material facts, [w]e review [the] trial court's order for summary judgment de novo to determine . . . whether either party is entitled to judgment as a matter of law." *Lanvale Props., LLC v. Cty. of Cabarrus*, 366 N.C. 142, 149, 731 S.E.2d 800, 806 (2012) (citations and quotations omitted). "When applying de novo review, we consider[] the case anew and may freely substitute our own ruling for the lower court's decision." *Id.* at 149, 731 S.E.2d at 806-07 (citations and quotations omitted).

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IV. Right to Appeal Pursuant to N.C. Gen. Stat. § 126-5(h)

The State contends that the trial court erred by granting summary judgment in favor of Vincoli. We agree.

The Declaratory Judgment Act provides: “Any person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status, or other legal relations thereunder.” N.C. Gen. Stat. § 1-254 (2013).

Chapter 126 of the North Carolina General Statutes governs the State Personnel System. N.C. Gen. Stat. § 126-5(a) (2013) states that Chapter 126 applies to “[a]ll State employees not herein exempt[.]” N.C. Gen. Stat. § 126-5(d)(1)(d) grants the Governor the authority to designate up to 1,500 “exempt positions” throughout various state departments, including DPS. N.C. Gen. Stat. § 126-5(b) defines “exempt positions” as “an exempt managerial position or an exempt policymaking position.” N.C. Gen. Stat. § 126-5(b), at the time, defined an “exempt managerial position” as

a position delegated with significant managerial or programmatic responsibility that is essential to the successful operation of a State department, agency, or division, so that the application of G.S. 126-35 to an employee in the position would cause undue disruption to the operations of the agency, department, institution, or division.

N.C. Gen. Stat. § 126-5(b)(2) (2013).

The repealed statute, N.C. Gen. Stat. § 126-34.1, provided in pertinent part:

(c) In the case of a dispute as to whether a State employee’s position is properly exempted from the State Personnel Act under G.S. 126-5, the employee may file in the Office of Administrative Hearings a contested case under Article 3 of Chapter 150B of the General Statutes.

....

(e) Any issue for which appeal to the State Personnel Commission through the filing of a contested case under Article 3 of Chapter 150B of the General Statutes has not been specifically authorized by this section shall not be grounds for a contested case under Chapter 126.

N.C. Gen. Stat. § 126-34.1 (2011).

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This statute was replaced by N.C. Gen. Stat. § 126-34.02 (2013). N.C. Gen. Stat. § 126-34.02(c) contains a similar contested case exclusion provision to that in N.C. Gen. Stat. § 126-34.1(e) and provides: “Any issue for which an appeal to the Office of Administrative Hearings has not been specifically authorized by this section shall not be grounds for a contested case hearing.” Our Supreme Court has explained:

There is no inherent right of appeal from an administrative decision to either the OAH or the courts. “No appeal lies from an order or decision of an administrative agency of the State or from judgments of special statutory tribunals whose proceedings are not according to the course of the common law, unless the right is granted by statute.” *In re Assessment of Sales Tax*, 259 N.C. 589, 592, 131 S.E.2d 441, 444 (1963).

Empire Power Co. v. N.C. Dep’t of Env’t, Health & Nat. Res., 337 N.C. 569, 586, 447 S.E.2d 768, 778 (1994).

However, N.C. Gen. Stat. § 126-5(h) provides: “In case of dispute as to whether an employee is subject to the provisions of this Chapter, the dispute shall be resolved as provided in Article 3 of Chapter 150B.” Article 3 governs the procedure for contested case hearings. North Carolina courts have recognized that N.C. Gen. Stat. § 126-5(h) provides an avenue for employees to challenge exempt designations. *See Batten v. N.C. Dep’t of Correction*, 326 N.C. 338, 345 n.3, 389 S.E.2d 35, 40 n.3 (1990), (noting § 126-5(h) as an example of a section in the Act describing employment-related grounds for a “contested case” arising under the State Personnel Act, interpreting that statute as providing grounds for a “dispute between employer and employee as to whether latter non-exempt”), *disapproved of on other grounds by Empire Power Co.*, 337 N.C. 569, 447 S.E.2d 768; *see also Jordan v. N.C. Dep’t of Transp.*, 140 N.C. App. 771, 774, 538 S.E.2d 623, 625 (2000) (holding that “[o]nce a position is designated as ‘exempt policymaking,’ whether or not the designation is correct, an employee wishing to contest such designation must do so according to N.C. Gen. Stat. § 150B” and citing N.C. Gen. Stat. § 126-5(h) (1999)).⁵

5. This is not a novel interpretation of N.C. Gen. Stat. § 126-5(h). Although its opinion is not binding upon us, the Fourth Circuit Court of Appeals of the United States has recognized that N.C. Gen. Stat. § 126-5(h) gives a State employee an avenue to challenge the re-designation of his position by the Governor to exempt status. *See Carrington v. Hunt*, 105 F.3d 646 (4th Cir. 1997) (unpublished). In *Carrington*, the Court stated that “a state employee has no property interest in continued non-exempt status if state law gives the executive discretion to determine which positions are exempt and to change such

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Although Article I of Chapter 150B expressly exempts DPS from the contested case provisions of Article III of Chapter 150B, *see* N.C. Gen. Stat. § 150B-1(e)(7), our Supreme Court has held that “the detailed provisions of Chapter 126, which govern the appeal of personnel actions affecting state employees, prevail with respect to [State] employees over the general departmental exclusion stated in the Administrative Procedure Act.” *Batten*, 326 N.C. at 344, 389 S.E.2d at 39. In *Empire Power Co.*, our Supreme Court clarified *Batten*’s holding as follows:

Batten involved the appeal of a grievance of an employee of an agency expressly exempted from the administrative hearing provisions of the [Administrative Procedure Act]; thus, under the plain meaning of the [Administrative Procedure Act], that employee can be entitled to an administrative hearing to appeal his grievance to the OAH only by virtue of another statute.

337 N.C. at 579, 447 S.E.2d at 774.

In the instant case, Vincoli is an aggrieved employee of DPS, an agency expressly exempted from the administrative hearing provisions of the Administrative Procedure Act. Although N.C. Gen. Stat. § 126-34.02(c) provides that “[a]ny issue for which an appeal . . . has not been specifically authorized by this section shall not be grounds for a contested case hearing[.]” the plain language of N.C. Gen. Stat. § 126-5(h) provides Vincoli with a statutory right to a hearing before OAH as to whether he is subject to the Act, which would implicate addressing whether his exempt designation was proper. Accordingly, based on this avenue of appeal, the trial court erred by granting summary judgment in favor of Vincoli.

V. Conclusion

Because we hold that Vincoli is entitled to a contested case hearing before OAH pursuant to N.C. Gen. Stat. § 126-5(h), we need not address his claims based upon his right to due process under Article I, Section 19 of the North Carolina Constitution. *See State v. Crabtree*, 286 N.C. 541, 543, 212 S.E.2d 103, 105 (1975) (holding that appellate courts will not pass upon constitutional questions if some other ground exists

designations.” *Id.* The Court, however, further stated that even if there is a property interest, “North Carolina law provides sufficient process to guard against its erroneous deprivation. The affected employee is entitled to ten working days’ notice before the change in status, N.C. Gen. Stat. § 126-5(g), and he may appeal to the State Personnel Office if he believes that the designation is illegal or error.” *Id.* (emphasis added).

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upon which the case may be decided). We reverse the trial court's order denying the State's motion for summary judgment and granting Vincoli's motion for summary judgment. Nothing in this opinion shall be construed to prejudice any right Vincoli may have to seek a contested case hearing under N.C. Gen. Stat. § 126-5(h).

REVERSED.

Judge DILLON concurs.

Judge DIETZ concurs in a separate opinion.

DIETZ, Judge, concurring.

I agree with the majority that the plain language of N.C. Gen. Stat. § 126-5 permits Vincoli to contest whether his position properly could be designated exempt under the State Personnel Act. Indeed, the statutory language hardly could be clearer. The title of Section 126-5 is "Employees subject to Chapter; exemptions." The statute then states precisely which positions can, and cannot, be designated as exempt positions that are not subject to the provisions of the chapter. Then, in subsection (h), the statute provides that "[i]n case of dispute as to whether an employee is subject to the provisions of this Chapter, the dispute shall be resolved as provided in Article 3 of Chapter 150B," which is the portion of the General Statutes governing contested cases filed in OAH.

The rub, of course, is that the General Assembly recently repealed N.C. Gen. Stat. § 126-34.1(c), a more specific statutory provision authorizing employees to challenge their exempt designation in OAH. If the general language of Section 126-5(h) already permits employees to challenge their exempt designation in OAH, then the repeal of the more specific language in Section 126-34.1(c) was meaningless. Ordinarily, we do not interpret the law in a way that renders actions of the General Assembly meaningless. See *Town of Pine Knoll Shores v. Evans*, 331 N.C. 361, 366, 416 S.E.2d 4, 7 (1992).

But this is not an ordinary case. Vincoli argues that, if we interpret the repeal of Section 126-34.1(c) as depriving him of any opportunity to contest his exempt designation in OAH, it would violate his constitutional rights. Whether meritorious or not, his argument certainly is not frivolous. And it is a long-standing principle of statutory construction that courts should "avoid an interpretation of a . . . statute that engenders constitutional issues if a reasonable alternative interpretation

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poses no constitutional question.” *Gomez v. United States*, 490 U.S. 858, 864 (1989).

Interpreting N.C. Gen. Stat. § 126–5(h) according to its plain meaning, notwithstanding the repeal of N.C. Gen. Stat. § 126–34.1(c), is a “reasonable alternative interpretation” of the statute. I therefore join the majority in reversing the trial court’s judgment. Under the plain language of N.C. Gen. Stat. § 126–5(h), Vincoli and other employees like him can challenge their exempt designations in a contested case at OAH. As a result, Vincoli’s constitutional challenge, premised on his inability to contest his exempt designation, is meritless.

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N.A., AND F/K/A WACHOVIA MORTGAGE, FSB F/K/A WORLD SAVINGS BANK, FSB, PLAINTIFF
v.
AMERICAN NATIONAL BANK AND TRUST COMPANY, SUCCESSOR BY MERGER TO
MIDCAROLINA BANK, DEFENDANT

No. COA15-689

Filed 1 November 2016

**1. Accord and Satisfaction—rescission of notice of satisfaction
—for any reason**

In a case of first impression involving N.C.G.S. § 45–36.6(b)—a statute that permits rescission of a notice of satisfaction for a security instrument if that instrument was “erroneously satisfied”—the Court of Appeals held that an instrument “erroneously satisfied of record” is one for which the certificate of satisfaction was erroneously or mistakenly filed for *any* reason, even a unilateral mistake having nothing to do with whether the underlying obligation actually was fully paid off.

**2. Accord and Satisfaction—rescission of notice of satisfaction
—summary judgment improper**

In a case involving rescission of a notice of satisfaction for a security instrument, the trial court erroneously granted summary judgment in favor of plaintiff bank where plaintiff bank forecast evidence that its filing of the satisfaction was a mistake but defendant bank forecast other, conflicting evidence suggesting that plaintiff bank intended to file the satisfaction because it believed the underlying loan had been paid off. This conflict in the forecasted evidence created a genuine issue of material fact for a jury to resolve.

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Judge STROUD dissenting.

Appeal by defendant from order entered 27 August 2014 by Judge Michael R. Morgan in Alamance County Superior Court. Heard in the Court of Appeals 19 November 2015.

Roberson Haworth & Reese, P.L.L.C., by Alan B. Powell, Christopher C. Finan, and Matthew A.L. Anderson, for plaintiff-appellee.

Clement Wheatley, by Darren W. Bentley, for defendant-appellant.

DIETZ, Judge.

This case presents an issue of first impression involving N.C. Gen. Stat. § 45–36.6(b), a statute that permits rescission of a notice of satisfaction for a security instrument if that instrument was “erroneously satisfied.”

The parties have two competing interpretations of the phrase “erroneously satisfied.” Wells Fargo argues that “erroneously” means precisely what it says—any error or mistake of any kind. American National argues that the statute applies only if the error was believing that the underlying secured obligation had been paid off when in fact it had not.

The legislature may have intended for American National’s interpretation to apply but, as explained below, the plain language of the statute and long-standing canons of statutory construction compel us to accept Wells Fargo’s interpretation. Of particular importance, this statute originally was taken directly from a model uniform law and formerly said precisely what American National claims it ought to mean here. But several years after adopting that uniform law, the legislature amended the statute and removed the language supporting the interpretation urged by American National. Under well-settled canons of statutory construction, we must conclude that this change had meaning. *Childers v. Parker’s, Inc.*, 274 N.C. 256, 260, 162 S.E.2d 481, 484 (1968).

Accordingly, we are constrained to hold that an instrument “erroneously satisfied of record” under N.C. Gen. Stat. § 45–36.6(b) is one for which the certificate of satisfaction was erroneously or mistakenly filed for *any* reason, even a unilateral mistake having nothing to do with whether the underlying obligation actually was fully paid off.

Although we agree with Wells Fargo’s interpretation of the statute, we do not agree that the record therefore supports entry of summary

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judgment in Wells Fargo's favor. Wells Fargo forecast evidence proving that its filing of the satisfaction was a mistake, including testimony from its Rule 30(b)(6) deponent. But American National forecast other, conflicting testimony and evidence which suggests Wells Fargo intended to file the satisfaction because it believed the underlying loan had been paid off. A jury must resolve this fact dispute. We thus reverse the entry of summary judgment and remand for further proceedings.

Facts and Procedural History

On 6 July 1999, homeowners Theodore and Chryssoula Bakatsias obtained financing and bought a home in Burlington. On 17 March 2004, the homeowners obtained an \$88,000 home equity line of credit from American National Bank¹ secured by a deed of trust on the property.

On 30 August 2004, the homeowners refinanced their original loan on the property with a \$350,000 loan from Wells Fargo secured by a deed of trust. Shortly after recording that 2004 deed of trust, the homeowners and Wells Fargo entered into a subordination agreement with American National providing that the 2004 loan would have priority over the home equity loan.

On 20 November 2006, the homeowners again refinanced their home loan through Wells Fargo. The parties prepared and executed a new deed of trust that secured this new loan. Neither the note nor the new deed of trust referenced the existing 2004 deed of trust. The homeowners used a portion of the 2006 loan sum to immediately pay off the remaining balance of the 2004 loan. Wells Fargo did not obtain a subordination agreement with American National with respect to the 2006 refinancing, as it did in 2004.

On 27 December 2006, Wells Fargo recorded a certificate of satisfaction, which certified that the debt secured by the 2004 deed of trust was fully satisfied and that the 2004 deed of trust was accordingly cancelled. Because Wells Fargo never obtained a subordination agreement with American National concerning the 2006 loan, the effect of cancelling the 2004 deed of trust was to elevate the home equity line of credit from American National to first priority, ahead of Wells Fargo's 2006 home loan. Wells Fargo contends that it erroneously filed its certificate of satisfaction and that it never intended to elevate American National's home equity line of credit to first priority position. Thus, roughly six

1. For ease of reading, this opinion will refer exclusively to American National and Wells Fargo, although some of the financing was done by their respective predecessors-in-interest.

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years later, on 27 August 2013, when Wells Fargo discovered the certificate of satisfaction and recognized its unintended effect, it recorded a document of rescission under N.C. Gen. Stat. § 45–36.6 to rescind the certificate of satisfaction and reinstate Wells Fargo's 2004 deed of trust to first priority.

Wells Fargo later sought a declaratory judgment that its rescission was effective and that it therefore “holds a valid and enforceable, first-priority lien” on the property. American National counterclaimed, alleging that “but for the wrongfully filed Rescission, American National holds a valid enforceable first-priority lien” on the property, and sought a declaration that the rescission was ineffective.

Wells Fargo moved for judgment on the pleadings and American National moved for summary judgment. On 27 August 2014, following a hearing, the trial court filed an order granting summary judgment for Wells Fargo, declaring that it held “a valid and enforceable, first-priority lien upon the entire fee simple interest” in the subject property, and dismissing American National's counterclaim. American National timely appealed.²

Analysis

I. The meaning of “erroneously satisfied”

[1] The crux of this case is the meaning of the phrase “[i]f . . . a security instrument is erroneously satisfied of record” in Section 45–36.6(b) of the General Statutes. That statutory provision, originally taken from a portion of the Uniform Residential Mortgage Satisfaction Act, allows a lender to undo the filing of a satisfaction for a security instrument and reinstate the cancelled security instrument with its original priority intact.

The parties assert two competing interpretations of the statute. Wells Fargo argues that “[t]he statute makes it clear that when a secured creditor determines that a unilateral mistake (of any kind) has resulted in the erroneous cancellation of a security instrument (for any reason and at any time), that secured creditor may file a verified document of rescission to remedy that mistake.” Under this interpretation, Wells Fargo need only establish that it filed the certificate of satisfaction and that the filing was, for any reason, a mistake. If so, then it may rescind the filing under the statute's plain language.

2. The trial court substituted DR Acquisitions, LLC—the successor-in-interest to American National Bank—as the defendant in this action on 18 December 2014.

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American National, by contrast, argues that the statute does not permit rescission for *any* mistake, but only the erroneous recording of satisfaction for an obligation that was not actually satisfied. Under this interpretation, Wells Fargo properly could rescind its certificate of satisfaction only if it could show that, after the homeowners paid off the 2004 loan with the 2006 refinancing, there was still some outstanding debt secured by the 2004 deed of trust.

The legislature may have intended for American National's interpretation to apply, but the plain language of the statute and long-standing canons of statutory construction compel us to accept Wells Fargo's interpretation.

As with all questions of statutory construction, we begin with the statute's plain language. The relevant statutory language is as follows:

If a release is recorded in error or a security instrument is erroneously satisfied of record, then the secured creditor or the person who caused the release to be recorded in error or the security instrument to be erroneously satisfied of record may execute and record a document of rescission. The document of rescission must be duly acknowledged before an officer authorized to make acknowledgments. Upon recording, the document of rescission either (i) rescinds a release that was recorded in error and deprives the release of any effect or (ii) rescinds the erroneous satisfaction of record of the security instrument and reinstates the security instrument.

N.C. Gen. Stat. § 45–36.6(b).

The disputed language is the phrase “if . . . a security instrument is erroneously satisfied of record” and, in particular, the meaning of the word “erroneously.” That term is not defined anywhere in the statute and thus is interpreted according to its ordinary meaning. *Morris Commc'ns Corp. v. City of Bessemer City*, 365 N.C. 152, 158, 712 S.E.2d 868, 872 (2011). The ordinary meaning of “erroneous” is “not correct” or “mistaken.” *Merriam-Webster* (new ed. 2016). Thus, an instrument “erroneously satisfied of record” is one that is incorrectly or mistakenly satisfied. This supports Wells Fargo's interpretation, because there is no textual limit on what *type* of mistake is necessary.

The legislative history of section 45–36.6 supports this conclusion. The statute is part of the Uniform Residential Mortgage Satisfaction Act that was adopted in North Carolina and a number of other states. The

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original version of the statute, enacted by our General Assembly in 2005, unquestionably limited rescission to circumstances in which the underlying obligation was not actually satisfied—or, put another way, unquestionably adopted American National's interpretation:

In this section, “document of rescission” means a document stating that an identified satisfaction or affidavit of satisfaction of a security instrument was recorded erroneously or that a security instrument was satisfied of record erroneously, *the secured obligation remains unsatisfied*, and the security instrument remains in force.

N.C. Gen. Stat. § 45–36.6(a) (2005) (now repealed); *see also* Unif. Residential Mortg. Satis. Act § 104(a) (Nat'l Conf. Comm'rs Unif. State Laws 2015).

In 2011, in a bill intended to “modernize” many provisions concerning deeds of trust and other instruments, the General Assembly deleted subsection (a), quoted above, and replaced it with the current version of the statute, which no longer requires that “the secured obligation remain unsatisfied” in order to file a document of rescission. 2011 N.C. Sess. Laws 312, § 4 (S.B. 679).

It is a longstanding principle of statutory construction that “an amendment to an unambiguous statute indicates the intent to change the law.” *Childers v. Parker's, Inc.*, 274 N.C. 256, 260, 162 S.E.2d 481, 484 (1968). Here, the original statute was taken directly from a carefully vetted uniform law developed under the auspices of the National Conference of Commissioners on Uniform State Laws. That provision was not ambiguous. Then, several years later, the General Assembly amended the statute and departed from the language in the model uniform law. We must presume that by changing the law—and in particular by departing from the language of a Uniform Act—the General Assembly intended for the new law to have a different meaning. *See id.*

Simply put, when we examine both the plain language and legislative history of this statute, it used to say what American National claims the statute means now. But then the legislature changed the law and it now says, and means, what Wells Fargo claims. *See id.*

American National argues that this interpretation of “erroneously satisfied” renders another section of the statute meaningless and thus should be rejected under a separate, longstanding principle of statutory construction. *See generally Lunsford v. Mills*, 367 N.C. 618, 628, 766 S.E.2d 297, 304 (2014). Specifically, American National points to the

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provision permitting damages against a person who “wrongfully” files a document of rescission. American National contends that if any unilateral mistake allows a party to rescind a certificate of satisfaction, a party could never “wrongfully” record a document of rescission under N.C. Gen. Stat. § 45–36.6(d), thus rendering that section meaningless.

We disagree. Even under Wells Fargo’s interpretation of the statute, there are countless ways in which a person could wrongfully file a document of rescission. For example, someone with no connection to the underlying obligation, and thus without statutory standing to file the rescission document, might do so, which is plainly “wrongful.” *See* N.C. Gen. Stat. § 45–36.6(b), (e)(5). Or a person with authority to file the document of rescission might do so not because they made some mistake but for some other, “wrongful” reason, such as to harass the debtor or secure leverage in negotiations with other parties who have issued secured loans to the same debtor. Thus, our interpretation of subsection (b) of the statute does not render subsection (d) superfluous.

The dissent also raises several points not raised by American National. First, the dissent expresses concern that “the briefs in this case did not really address legislative history or statutory construction” and therefore “the Court does not have the benefit of full briefing and argument of this rationale.”

To be sure, the parties could have more fully addressed the proper construction of this statute. But there is no question that the meaning of the statute is an issue preserved for appellate review—indeed, it is the primary issue in this case both at the trial level and on appeal. When this Court is called upon to interpret a statute, we must examine the text, consult the canons of statutory construction, and consider any relevant legislative history, regardless of whether the parties adequately referenced these sources of statutory construction in their briefs. To do otherwise would permit the parties, through omission in their briefs, to steer our interpretation of the law in violation of the axiomatic rule that while litigants can stipulate to the facts in a case, no party can stipulate to what the law is. That is for the court to decide.

The dissent next points to the title of the bill enacting the 2011 amendments, which indicates that it is an act to “modernize” various aspects of secured transactions, including “equity line liens.” The dissent speculates that the removal of the phrase “the secured obligation remains unsatisfied” may have been meant only to address an issue in which “a home equity line of credit with a zero balance outstanding” is mistakenly canceled because it reached a zero balance, despite the parties intending for the credit line to remain open.

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It is certainly possible that this legislative change was intended solely for the purpose the dissent identifies. But there are several reasons for doubt. First, the bill also separately amended several statutes dealing exclusively with equity line security instruments—statutes that have nothing to do with rescission. *See, e.g.*, 2011 Sess. Laws 312, §§ 21, 23 (S.B. 679), *amending* N.C. Gen. Stat. §§ 45–82, 45-82.2. The reference to “equity lien lines” in the title of the bill might be a reference to these provisions, not to the changes in the rescission statute. Second, Chapter 45 of the General Statutes already contains a section addressing the additional steps that must be taken to cancel an instrument securing a home equity line of credit or similar loan that can have a zero balance yet not be subject to cancellation. *See* N.C. Gen. Stat. § 45–36.9. In other words, by law, a home equity line of credit does not become “satisfied” simply by reaching a zero balance. This, in turn, means there was no pressing need to amend the uniform act to ensure that it applied to home equity lines of credit.

All of this means (as the dissent observes) that this “equity line liens” interpretation is but one of several “equally possible” legislative intents about which we can only speculate. And, more fundamentally, this speculation about the intent of the 2011 amendment has no effect on our initial observation that the plain language of “erroneously satisfied of record” supports Wells Fargo’s interpretation.

In sum, this Court has two choices: (1) we can apply the plain language and settled canons of statutory construction, which results in a statutory interpretation that the legislature may not have intended; or (2) we can interpret the statute in the way we, as judges, *think* the legislature intended, which may also result in a statutory interpretation that the legislature may not have intended. The choice is obvious. We will not speculate about what we think the legislature intended; we will apply the plain language and applicable statutory canons and, if the result is unintended, the legislature will clarify the statute.

Accordingly, we hold that an instrument “erroneously satisfied of record” under N.C. Gen. Stat. § 45–36.6 is one for which the certificate of satisfaction was erroneously or mistakenly filed for *any* reason, even a unilateral mistake not apparent to anyone except the party who mistakenly filed it.

II. Material dispute of fact concerning the erroneous filing

[2] Although we accept Wells Fargo’s interpretation of the statute, that is not the end of this appeal. The trial court entered summary judgment in favor of Wells Fargo. Summary judgment is appropriate only if “there

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is no genuine issue as to any material fact” in the case. N.C. R. Civ. P. 56(c). Under the statutory construction of N.C. Gen. Stat. § 45–36.6 described above, there are genuine issues of material fact that preclude summary judgment.

To be sure, Wells Fargo forecast evidence showing that its filing of the certificate of satisfaction was a mistake. For example, Wells Fargo’s Rule 30(b)(6) deponent stated that the company’s records indicated that the 2004 loan “was never paid off” and that he knew this to be true because the 2004 loan “still exists within our systems of records. The—the mortgager is still due and owing on the note for this property.” According to Wells Fargo, this evidence shows that the company believed the 2004 deed of trust still secured some outstanding obligation and thus it was a mistake to file the certificate of satisfaction.³

But there is at least some evidence that discredits this testimony and creates a genuine issue of material fact. For example, American National points to the 2006 deed of trust, which was prepared at the same time as the 2006 note. That deed of trust secured the 2006 note and described itself as the “first deed of trust” with respect to the 2006 loan. None of the paperwork concerning the 2006 refinancing mentions the 2004 deed of trust. American National also points to testimony from Wells Fargo’s 30(b)(6) deponent acknowledging that, as a matter of company practice, if a loan is paid off in full, the company would prepare and file a certificate of satisfaction for the corresponding deed of trust. Thus, there is at least some evidence indicating that Wells Fargo’s filing of the certificate of satisfaction was not a mistake; rather, this evidence suggests that, for whatever reason, Wells Fargo chose not to have the 2006 loan secured by the 2004 deed of trust. This, in turn, would mean that Wells Fargo filed the certificate of satisfaction on purpose, not by mistake.

3. Wells Fargo also argues that, regardless of its subjective intent, rescission was appropriate because the 2004 deed of trust automatically secured the 2006 loan because the deed of trust contained “future advances/obligations” language. We disagree. The deed of trust unquestionably secured “future advances,” as indicated by a section in the deed of trust titled “Future Advances.” Future advances are additional disbursements of funds that increase the “outstanding principal balance owing on an obligation.” N.C. Gen. Stat. § 45–67(1). The 2006 loan did not increase the “outstanding principal balance” owed under the 2004 loan. It was an entirely new loan, with its own deed of trust (which described itself as the “first deed of trust” with respect to the 2006 loan), and which never referenced the 2004 loan or the 2004 deed of trust. At best, the 2006 loan was a “future obligation” under N.C. Gen. Stat. § 45–67(2), not a future advance, and the 2004 deed of trust does not contain sufficient language to automatically secure “future obligations” having no connection to the original 2004 loan. *See* N.C. Gen. Stat. § 45–68(1b).

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Simply put, under the statutory analysis of N.C. Gen. Stat. § 45–36.6 discussed above, this case cannot be resolved on summary judgment. Genuine issues of material fact exist concerning whether Wells Fargo filed the certificate of satisfaction by mistake or on purpose. We therefore reverse the trial court's entry of summary judgment and remand for further proceedings.

Conclusion

We reverse the trial court's entry of summary judgment and remand for further proceedings.

REVERSED AND REMANDED.

Judge TYSON concurs.

Judge STROUD dissents with separate opinion.

STROUD, Judge, dissenting.

Because I do not believe that the 2011 amendments to N.C. Gen. Stat. § 45-36.6 (2015)¹ would allow the type of mistake that Wells Fargo made in this case to be corrected by rescinding the cancellation of the deed of trust, I dissent from the majority. While I would also reverse the trial court's order, I would hold – unlike the majority – that the trial court should have granted summary judgment in favor of defendant and declared American National, not Wells Fargo, as the first priority lienholder.

The majority correctly states that the “crux of this case” is the meaning of the phrase “[i]f . . . a security instrument is erroneously satisfied of record” contained in N.C. Gen. Stat. § 45-36.6. However, I disagree with the majority's contention that Wells Fargo's error was its act of canceling the 2004 deed of trust of record. Wells Fargo was required by law to cancel the 2004 deed of trust. Indeed, the undisputed evidence shows that the loan secured by the 2004 deed of trust was, in fact, satisfied and terminated with the proceeds from the subsequent 2006 note secured by the 2006 deed of trust. Rather, Wells Fargo's “error” was failing to obtain an agreement from American National to subordinate American

1. As the statute has not been amended since 2011, we refer to the 2015 version, which accurately reflects the statute as it stood at the time the document of rescission was recorded in this case, on 27 August 2013.

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National's lien to Wells Fargo's 2006 deed of trust. When the 2004 note was satisfied and terminated, the 2004 deed of trust was no longer of any effect. *See Walston v. Twiford*, 248 N.C. 691, 693, 105 S.E.2d 62, 64 (1958) (" 'A mortgage which purports to secure the payment of a debt has no validity if the debt has no existence.' " (quoting *Bradham v. Robinson*, 236 N.C. 589, 594, 73 S.E.2d 555, 558 (1952))). At that point, it was Wells Fargo's obligation to cancel the 2004 deed of trust. *See* N.C. Gen. Stat. § 45-36.9(a) (2015) ("A secured creditor shall submit for recording a satisfaction of a security instrument within 30 days after the creditor receives full payment or performance of the secured obligation.").

Much of the majority's analysis is based upon legislative history and canons of statutory construction, although the briefs in this case did not really address legislative history or statutory construction. So my first concern is that the Court does not have the benefit of full briefing and argument of this rationale, although this is the first published opinion interpreting the 2011 amendments to Article 45.

It is true that the amendments were apparently intended to "modernize" the law regarding deeds of trust, as indicated by the bill's subtitle, which in full is "AN ACT TO MODERNIZE AND ENACT CERTAIN PROVISIONS REGARDING DEEDS OF TRUST, INCLUDING RELEASES, SHORT SALES, FUTURE ADVANCE PROVISION TERMINATIONS AND SATISFACTIONS, TERMINATIONS AND SATISFACTIONS FOR EQUITY LINE LIENS, RELEASE OF ANCILLARY DOCUMENTS, ELIMINATING TRUSTEE OF DEED OF TRUST AS NECESSARY PARTY FOR CERTAIN TRANSACTIONS AND LITIGATION, AND INDEXING OF SUBSEQUENT INSTRUMENTS RELATED THERETO." 2011 N.C. Sess. Laws 2011-312. On the other hand, as an act to "MODERNIZE . . . TERMINATIONS AND SATISFACTIONS FOR EQUITY LINE LIENS," *id.*, the bill could also be understood as intending to address mistakes where a home equity line of credit has been mistakenly cancelled when the balance was paid off, although the line of credit remains open, or a bank cancels the wrong deed of trust when a loan is paid off.

Under the original version of N.C. Gen. Stat. § 45-36.6 (2005), the erroneous cancellation of an equity line could only be rescinded if there was a balance owing on the line of credit when the erroneous cancellation occurred. That is, under the former statute, a " 'document of rescission' " could only be used to correct an error where "the secured obligation remains unsatisfied." N.C. Gen. Stat. § 45-36.6(a) (2005). But it is a modern reality that equity lines at times have balances owing and then are paid to zero, yet remain open and available to be drawn upon again. I believe that the deletion of the phrase "the secured obligation

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remains unsatisfied” was merely intended to “modernize” the statute to allow the erroneous cancellation of an equity line to be rescinded, even if the line had a zero balance at the time of the error.

I do not believe that the deletion was intended to apply in the situation in the present case where a deed of trust was cancelled because the loan it secured was paid off by a new loan secured by a different deed of trust. Wells Fargo *intended* to cancel the deed of trust in this case. The “error” was not based upon the homeowner’s ability to borrow again on the note that had been paid off. Instead, that note had been satisfied, never to be drawn upon again, and replaced by a new note secured by a new deed of trust. The “error” was Wells Fargo’s failure to do a title search when first filing the new deed of trust and then failing to obtain a subordination agreement. Wells Fargo did not “erroneously” cancel the 2004 deed of trust; it failed to get a subordination agreement from American National. This type of error was not correctable under the original version of N.C. Gen. Stat. § 45-36.6, and I do not believe that the 2011 amendment changes this outcome.

An equally possible legislative intent for this amendment was to address a situation where a home equity line of credit is mistakenly cancelled when no balance is owing although the credit line remains open. Under the law before the 2011 amendment, a wrongly cancelled deed of trust securing a home equity line of credit with no balance owing could not be revived, because at the time of the cancellation, the secured obligation was in fact satisfied. With the 2011 amendment, a home equity line of credit with a zero balance outstanding but which remains open and available to draw upon which is wrongfully cancelled can be revived simply by rescission of the cancellation.

Even accepting Wells Fargo’s evidence as true and construing it in the light most favorable to Wells Fargo, under my interpretation of the statute, Wells Fargo cannot demonstrate any genuine issue of material fact, since the “error” it alleges is not the type of “error” which allows rescission under N.C. Gen. Stat. § 45-36.6(b). I would therefore reverse the trial court’s order and remand for entry of an order granting summary judgment in favor of defendant and declaring that Wells Fargo’s attempted rescission was ineffective and thus defendant holds a valid, enforceable first priority lien upon the real property.

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WILLOWMERE COMMUNITY ASSOCIATION, INC., A NORTH CAROLINA NON-PROFIT CORPORATION, AND NOTTINGHAM OWNERS ASSOCIATION, INC.,
A NORTH CAROLINA NON-PROFIT CORPORATION, PLAINTIFFS

v.

CITY OF CHARLOTTE, A NORTH CAROLINA BODY POLITIC AND CORPORATE, AND
CHARLOTTE-MECKLENBURG HOUSING PARTNERSHIP, INC.,
A NORTH CAROLINA NON-PROFIT CORPORATION, DEFENDANTS

No. COA15-977

Filed 1 November 2016

Jurisdiction—standing—homeowners associations—compliance with bylaws

Where the plaintiff homeowners associations (HOAs) filed a lawsuit challenging the validity of a zoning ordinance that permitted multifamily housing on parcels of land abutting property owned by plaintiffs, the Court of Appeals held that plaintiff HOAs' failure to comply with various provisions in their corporate bylaws when their respective boards of directors initiated litigation prevented them from having standing to bring the lawsuit.

Judge DIETZ concurring in a separate opinion.

Appeal by plaintiffs from order entered 14 April 2015 by Judge Forrest D. Bridges in Superior Court, Mecklenburg County. Heard in the Court of Appeals 27 January 2016.

Kenneth T. Davies, for plaintiff-appellants.

Assistant City Attorney Thomas E. Powers III and Senior Assistant City Attorney Terrie Hagler-Gray, for defendant-appellee City of Charlotte.

Moore & Van Allen, PLLC, by Anthony T. Lathrop and Glenn E. Ketner, III, for defendant-appellee Charlotte-Mecklenburg Housing Partnership, Inc.

STROUD, Judge.

Plaintiffs appeal the trial court's order allowing defendants' motion for summary judgment. The trial court correctly granted summary judgment dismissing plaintiffs' lawsuit based upon lack of standing to file the

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suit because neither plaintiff complied with their respective bylaws to authorize initiating litigation.

I. Background

In September of 2013, defendant Charlotte-Mecklenburg Housing Partnership, Inc. (“CMHP”) sought and obtained rezoning of about 7.23 acres abutting portions of the residential subdivisions represented by plaintiffs Willowmere Community Association, Inc. (“Willowmere”) and Nottingham Owners Association, Inc. (“Nottingham”) (collectively “plaintiff HOAs”). Defendant CMHP planned to develop up to 70 multifamily housing units on the property which had been previously approved for development as a child care center. The rezoning was hotly contested by local residents and plaintiffs at the public hearing in December of 2013, but ultimately the City Council approved the rezoning application. Plaintiffs then filed this lawsuit challenging the rezoning. This appeal does not involve the substance of plaintiffs’ challenges to the propriety of the rezoning but only plaintiffs’ legal standing to bring the claim, so we will address only the relevant background regarding the issues before this Court.

In October of 2014, plaintiff HOAs requested summary judgment in the action they had brought against defendants. Later in October, defendant CMHP filed a cross-motion for summary judgment. In November of 2014, defendant City also filed a cross-motion for summary judgment.

After a two-day hearing on the summary judgment motions, the trial court entered an order in April of 2015 agreeing with all the parties “that there is no genuine issue of material fact” and ultimately resolving the legal issue of standing in favor of defendants, determining that plaintiffs did not have standing to bring the action because “they failed to follow the requirements in their respective bylaws with regard to their decisions to initiate this litigation.” Though findings of fact are not required in a summary judgment order, *see generally* N.C. Gen. Stat. § 1A-1, Rule 56(c) (2013), the trial court made 14 findings of fact “[i]n order to explain the Court’s reasoning in reaching its conclusion[.]” The trial court noted the findings it had made were uncontested, including:

2. Willowmere admitted, in the deposition of its corporate representative, Michael J. Kelley, that its Board of Directors decided to initiate the lawsuit without a formal meeting. Willowmere produced an email string among the directors that it claimed was sufficient to serve as written consent to action outside a meeting under Article III, Section 18 of its bylaws.

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3. An email consent of this type is not expressly authorized by Willowmere's bylaws to satisfy the requirement of written consent, signed by all of the Directors of Willowmere.

4. Although N.C.G.S. § 55A-1-70 permits North Carolina non-profit corporations to agree to conduct transactions through electronic means, the undisputed evidence is that Willowmere has not taken any action permitting it to invoke this statute. Consequently, there is no authorization for the email string to serve as a written consent to action without a formal meeting.

5. It follows that Willowmere did not act in accordance with its bylaws with regard to its decision to initiate this litigation. Therefore, Willowmere lacks standing.

6. To establish the propriety of the decision by Nottingham to initiate this lawsuit, Nottingham relies on the deposition testimony of its representative, Mr. Kenneth S. Anthonis, who testified that he had a telephone conversation with at least one other director. The record does not reveal a meeting with a quorum of directors present either in person or by phone at which the filing of the litigation was authorized. The record also does not reveal that the Board filed written consents or minutes reflecting the proceedings of the Board, nor that the Board posted the explanation of the action taken within three (3) days after the written consents of the Board were obtained, as required under Article 5, Section 5 of Nottingham's Bylaws.

7. Mr. Anthonis testified in his deposition, as the corporate representative of Nottingham, that there had been no formal meeting of the Nottingham Board of Directors at any time to decide to file this lawsuit. In his deposition transcript, Mr. Anthonis stated affirmatively that there were no written consents or minutes memorializing the decision to proceed with the lawsuit.

8. The failure to comply with Article 5, Section 5 of Nottingham's bylaws concerning action by directors taken without a meeting, discussed above with respect to Willowmere, is also present for Nottingham, which, therefore, also lacks standing.

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9. While Plaintiffs' bylaws each permit their directors to sue regarding matters affecting their planned communities, the directors can only act through a meeting or a consent action without a meeting. Neither Willowmere nor Nottingham has met their burden to show that their directors acted to initiate this litigation through one of these means in this case.

10. Defendants' arguments regarding Plaintiffs' standing present a challenge to the jurisdiction of the Court. Under N.C. Rule 12(h)(3), a challenge to jurisdiction may be brought at any time.

11. For the reasons discussed above, the Court concludes that Plaintiffs lack standing, and consequently that the Court lacks jurisdiction to hear their challenge to Ordinance 5289-Z adopted by the City.

Plaintiffs appeal.

II. Standing

The only issue before this Court on appeal is regarding whether plaintiffs have standing to bring this action; none of the underlying issues which led to this action are before this Court. Plaintiffs make three arguments regarding standing: (1) defendants do not have standing to challenge plaintiffs' standing on the basis asserted; (2) plaintiffs have standing because they complied with their bylaws in approving filing the lawsuit; and (3) even if they failed to comply with their bylaws, these violations are non-jurisdictional, and thus they still have standing.

A. Raising the Issue of Standing

Plaintiffs first contend that "defendants lack both statutory standing to challenge the validity of the associations' actions, and contractual standing to enforce the associations' bylaws." (Original in all caps.) Essentially plaintiffs contend that since defendants are not parties to the bylaws, they do not have standing to raise a standing issue based upon any alleged violation of plaintiffs' bylaws.

Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction. As the party invoking jurisdiction, plaintiffs have the burden of establishing standing. . . .

....

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Our standard of review on appeal of a trial court's dismissal on the grounds of lack of standing is *de novo*.

Marriott v. Chatham Cty., 187 N.C. App. 491, 494, 654 S.E.2d 13, 16 (2007) (citation and quotation marks omitted).

Although defendants do argue in support of the trial court's conclusion that plaintiffs lack standing, defendants did not initially raise standing as a defense; standing was not raised in defendants' motions to dismiss, answers, or motions for summary judgment. Unfortunately, the second day of the hearing on 12 March 2015 was not recorded, but by plaintiffs' own characterization,

[f]ollowing a hearing on the parties' cross-Motions for Summary Judgment on 14 January 2014, the Honorable Forrest D. Bridges took the matter under advisement. The parties reconvened before Judge Bridges on 12 March 2015 to receive his decision, *at which time Judge Bridges unexpectedly requested further argument on the issue of the Associations' standing.*

(Emphasis added).

As neither defendant had raised the issue of standing in the answers or substantive motions and as "Judge Bridges unexpectedly requested further argument on the issue of the Associations' standing[.]" it appears that the trial court raised the issue of standing *ex mero motu*. Since "[s]tanding is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction[,] *id.*", "a court has inherent power to inquire into, and determine, whether it has jurisdiction and to dismiss an action *ex mero motu* when subject matter jurisdiction is lacking." *Reece v. Forga*, 138 N.C. App. 703, 704, 531 S.E.2d 881, 882 (2000). Furthermore, even assuming *arguendo* that defendants did raise the issue of standing, once the issue was raised and appeared to have merit it was appropriate for the trial court to consider the issue on its own motion.¹ *See generally Fort v. Cnty. of Cumberland*, 218 N.C. App. 401, 404, 721 S.E.2d 350, 353 (2012) ("Whether a party has standing to maintain an action implicates a court's subject matter jurisdiction and may be raised at any time, even on appeal." (citation and quotation marks omitted)). Therefore, whether

1. The trial court found "[d]efendants' arguments regarding [p]laintiffs' standing present a challenge to the jurisdiction of the Court." It is unclear from this sentence whether defendants initially raised the issue of standing, but even if they did not, they obviously argued that plaintiffs did not have standing once the trial court raised and requested argument on the issue.

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raised by defendants or by the trial court's own motion, the trial court properly considered plaintiffs' standing to bring this action, and we likewise must consider the issue.

B. Plaintiffs' Compliance with Bylaws

Plaintiffs next contend that they had standing to bring this action because "the associations did, in fact, each comply with the requirements of their respective bylaws to initiate litigation." (Original in all caps.)

1. Plaintiff Willowmere

Plaintiff Willowmere argues that "Willowmere's Board, acting without a meeting, unanimously authorized litigation through a chain of emails." Plaintiff Willowmere notes that its bylaws provide:

Section 18. Action Without a Formal Meeting. Any action to be taken at a meeting of the Directors or any action that may be taken at a meeting of the Directors may be taken without a meeting if a consent in writing, setting forth the action so taken, shall be signed by all the Directors. An explanation of the action taken shall be posted at a prominent place or places within the Common Area within three (3) days after the written consents of all the Board members have been obtained.

Plaintiff Willowmere argues that its emails "comply with the requirements of [its] bylaws to initiate litigation." (Original in all caps.)

But even if we assume that plaintiff Willowmere's interpretation of its bylaws is correct *and* it could use email in compliance with North Carolina statutes, those emails are not part of our record on appeal. "As the party invoking jurisdiction, plaintiffs have the burden of establishing standing." *Marriott*, 187 N.C. App. at 494, 654 S.E.2d at 16. Without the emails which plaintiff Willowmere claims establish its compliance with its bylaws to initiate litigation, plaintiff Willowmere has not carried its burden. In addition, even if the emails did authorize the filing of the action, there is no evidence that "an explanation of the action taken" was "posted at a prominent place or places within the Common Area within three (3) days after the written consents of all the Board members" were obtained by email. Plaintiff Willowmere's board's action was not taken in compliance with its bylaws.

2. Plaintiff Nottingham

Plaintiff Nottingham argues that its board "authorized litigation via a telephone conversation" so it was not required that the board hold an

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actual meeting to authorize initiation of litigation. Plaintiff Nottingham argues that telephone conversations qualified as the board's meeting and argues that defendants "misconstru[ed]" their president's statements made during his deposition that there was no meeting held. Plaintiff Nottingham then quotes the president's deposition with the following bold, italics, and underlining emphasis inserted by plaintiffs:

- Q. Was there an official meeting of the board at which the decision was taken?
- A. It was ***phone conversation***, so not an official board meeting.
- ...
- Q. Did you have a three-way telephone conversation between – or maybe a four-way between the members of the board who participated *and* the management company?
- A. No. I talked with the management company ***and then talked separately with the board.***

Turning to the actual deposition though, and not merely plaintiff's quoted portions, it is clear that plaintiff Nottingham's president did not consult the relevant bylaws:

- Q. And was input on that decision sought from the members of the association?
- A. No.
-
- Q. Was there a formal board meeting of Nottingham at any time at which the decision to initiate this lawsuit was discussed?
- A. No.
- Q. Did you and Ms. Tomljanovic and possibly Mr. Viscount refer to any specific provisions in the governing documents of Nottingham to determine whether you had the power to make that decision?
- A. We sought advice from the management company.
- Q. So you did not refer to the documents?

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A. We did not refer to the documents, no.

. . . .

Q. All right. Did the management company identify any specific provision in the bylaws or any other governing document to grant the board the power to make those two decisions we were just talking about?

A. Not that I recall, no.

Q. Let me refer you back to Exhibit 10-B, which is the bylaws. After the decision that you talked about – or the two decisions that you talked about to initiate the lawsuit and to pay for counsel, did the board or the management company produce written consents memorializing that decision?

A. No.

Q. Is there any provision that you're aware of in this bylaws document, Exhibit 10-B, that grants either the association or the board of the association the power to initiate lawsuits?

A. Not that I'm aware of, no. I'll clarify that and say there may be, but I don't know off the top of my head that there is.

Q. One of the topics for your deposition today that you were to be prepared for was to talk about the governing documents of the organization, correct?

A. Yes.

Q. And you're not aware of any provision in there that permits the organization or the board acting for the organization to initiate a lawsuit, correct?

A. Correct.

Based upon plaintiff Nottingham's president's deposition, the trial court correctly noted as an undisputed fact that plaintiff Nottingham's board did not hold a meeting open to members, as contemplated by the bylaws, at which they approved initiation of the lawsuit.

Defendants contend that the trial court correctly determined that plaintiff Nottingham did not hold a meeting either pursuant to article 7,

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section 1 of plaintiff Nottingham's bylaws for "Regular Meetings" or pursuant to article 7, section 2 for "Special Meetings[,]," both of which by the plain language of the provisions require prior written notice. Defendants argue that the only way for plaintiffs to properly take action without a meeting is pursuant to article 5, section 5 of plaintiff Nottingham's bylaws entitled "Action Taken Without a Meeting." However, article 5, section 5 requires "written consent of all of the Directors[,]," and it is uncontested that there was no written memorialization, so this section cannot apply. Nonetheless, plaintiff Nottingham contends that its bylaws do not prohibit holding a meeting of the board by teleconference and that "Board was permitted to hold a *regular* meeting through a simultaneous teleconference." (Emphasis added.) Plaintiff Nottingham also argues that this type of meeting is permissible under North Carolina General Statute § 55A-8-20, which provides:

(a) The board of directors may hold regular or special meetings in or out of this State.

(b) Unless otherwise provided by the articles of incorporation, the bylaws, or the board of directors, any or all directors may participate in a regular or special meeting by, or conduct the meeting through the use of, any means of communication by which all directors participating may simultaneously hear each other during the meeting. A director participating in a meeting by this means is deemed to be present in person at the meeting.

(c) Unless the bylaws provide otherwise, special meetings of the board of directors may be called by the president or any two directors.

N.C. Gen. Stat. § 55-8-20 (2013).

But even if plaintiff Nottingham's board could hold a teleconference meeting under the bylaws and North Carolina General Statute § 55-8-20, the bylaws require more than simply a conversation among some of the directors, whether in person or by telephone. For example, both "Regular Meetings[,]," the type plaintiff Nottingham argues was conducted, and "Special Meetings" have specific requirements regarding advance notice of the time and location of the meeting. In addition, all meetings, regular and special, "shall be open to all members of the Association; provided, however, that Members who are not Directors may not participate in any deliberation or discussion unless expressly so authorized by the vote of a majority of a quorum of the Board." The Board is also required to "[c]ause to be kept a complete record of all its acts and corporate affairs"

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pursuant to article 8, section 3, and the secretary is to “keep minutes of all meetings of the Board” pursuant to article 9, section 8(c), so there should be a written memorialization for any meeting, whether in person or by phone. It is undisputed that there was no written advance notice of the place or time of the alleged phone meeting and there are no minutes from the alleged phone meeting. Thus, even if the Board could have held a meeting by telephone, it would still have to comply with the other requirements of the bylaws for meetings, particularly notice, so that members would at least have the opportunity to be aware of the board’s actions. In summary, plaintiff Nottingham’s evidence shows, at most, that the president and some directors discussed initiating this lawsuit by phone, without prior notice to anyone of the time or place, and no written memorialization of either the meeting or the decision to initiate litigation were kept. Nottingham has failed to show that it held a regular meeting or a special meeting in accordance with its bylaws at which the directors could authorize initiating litigation.

C. Non-Jurisdictional Violations

Lastly, plaintiffs argue that even if they did violate their own bylaws in filing their lawsuits without first obtaining proper authorization, these violations are merely technical, non-jurisdictional violations and would not affect their standing to bring this action. Plaintiffs make two specific arguments regarding why they should still have standing even without compliance with their bylaws.

First, plaintiffs contend that “[t]he plain language of the Bylaws do not evidence any jurisdictional limitations or a prelitigation requirement[.]” But plaintiffs misapprehend the meaning of jurisdiction. Jurisdiction is neither granted nor taken away by private bylaws since parties themselves cannot confer subject matter jurisdiction upon a court, even by consent:

Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question and is conferred upon the courts by either the North Carolina Constitution or by statute. Subject matter jurisdiction rests upon the law and the law alone. It is never dependent upon the conduct of the parties. Specifically, subject matter jurisdiction cannot be conferred by waiver or consent of the parties.

Mosler v. Druid Hills Land Co., 199 N.C. App. 293, 295, 681 S.E.2d 456, 458 (2009) (citations, quotation marks, and brackets omitted).

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The trial court granted summary judgment in favor of defendants not due to general subject matter jurisdiction but due to a lack of plaintiffs' standing.

Parties without standing to bring a claim, cannot invoke the subject matter jurisdiction of the North Carolina courts to hear their claims.

. . . The Courts in our state use the term 'standing' to refer generally to a party's right to have a court decide the merits of a dispute. A court may not properly exercise subject matter jurisdiction over the parties to an action unless the standing requirements are satisfied.

Teague v. Bayer AG, 195 N.C. App. 18, 22-23, 671 S.E.2d 550, 554 (2009) (citations and quotation marks omitted).

In *Laurel Park Villas Homeowners Assoc. v. Hodges*, property owners sued under the name of their homeowners association, and this Court affirmed the decision to dismiss the suit for lack of standing:

Plaintiff argues that the corporate bylaws expressly give it the power to bring this action. We agree that there is a provision in plaintiff's Articles of Incorporation that purports to give the corporation that power. However, a provision of the bylaws indicates that all powers of the corporation shall be exercised by the board of directors, and allows the board to designate officers. There is nothing in the articles or the bylaws authorizing persons other than the board, its officers, or the membership to act on behalf of the corporation, and nothing in the record suggesting that any of these authorized this action. In any event, the bylaws also provide that they are established in accordance with G.S. Chapter 47A, and that in case of conflict the statute shall control. Since the statute specifically designates who may sue to enforce the restrictions, it controls. We therefore hold that the court correctly determined that plaintiff lacked standing to prosecute this action.

82 N.C. App. 141, 143–44, 345 S.E.2d 464, 466 (1986). Here too plaintiffs failed to comply with their own bylaws in bringing this action. *See id.*

Plaintiffs' final argument is that "[a]dministrative and procedural provisions, such as those contained in the Bylaws of the Associations, are nonjurisdictional, and do not bear upon the authority of the courts

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to hear and adjudicate [p]laintiff's claims." Plaintiffs contend that requiring compliance with bylaws is a "mere technicalit[y]" that "elevat[es] form over substance[.]" Although plaintiffs' boards of directors have more power to make decisions on behalf of the associations than just a general member, the members and the bylaws confer that power of each board of directors. The very purpose of plaintiffs' boards is to act on behalf of its members; a rogue board of directors taking actions outside of its bylaws is no more representative of the entity than a rogue member who has taken the same actions. For example, in *Beech Mountain Property Owners' Assoc. v. Current*, property owners sued under the name of their homeowners association to enforce restrictive covenants. 35 N.C. App. 135, 135, 240 S.E.2d 503, 505 (1978). This Court addressed other matters unrelated to the issues in this case but also ultimately determined that

[w]e are of the opinion that a strict construction of the provisions in the present case compels the conclusion that the plaintiff lacks the capacity to raise the issues in this suit. The plaintiff is a corporation and, as such, must be viewed as an entity distinct from its individual members.

Id. at 139, 240 S.E.2d at 507. The Court determined that the property owners had the right to sue, *not* the association, because the covenants in that case granted

the right of enforcement of the restrictions to the owners of lots or any of them jointly or severally[.] And we must assume that if the grantor had intended to authorize the plaintiff [association] to enforce the provisions as an agent of the property owners, it would have expressed such intent.

Id. (quotation marks and ellipses omitted).

Here, plaintiffs failed to hold a meeting or take other action in accordance with their bylaws to authorize the filing of this lawsuit. In *Beech Mountain Property Owners' Assoc.*, and *Laurel Park Villas Homeowners Assoc.*, property owners sued on behalf of an association without the proper authorization of that association to take that action. See *Beech Mountain Property Owners' Assoc.*, 35 N.C. App. at 135, 240 S.E.2d at 505; *Laurel Park Villas Homeowners Assoc.*, 82 N.C. App. at 143-44, 345 S.E.2d at 466. Here, two boards sued on behalf of the associations also without the proper authorization to take that action. Such actions go far beyond "mere technicalities" and "elevating form over substance" as essentially a small portion of the association has taken

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the steps to speak for the whole. Both plaintiffs had specific bylaw provisions for how to handle issues such as this, and both ignored those provisions. In addition, plaintiffs have not presented any evidence that the boards took action in accord with their bylaws to ratify the filing of the lawsuit after the issue of standing was raised. This Court has no way of knowing the position the members of the homeowners' associations would actually take in this case as their representatives acted beyond the scope of their authority in disregarding their bylaws. Therefore, we affirm the trial court's decision to dismiss for lack of standing.

III. Conclusion

For the foregoing reasons, we affirm.

AFFIRMED.

Judge ELMORE concurs.

Judge DIETZ concurs in a separate opinion.

DIETZ, Judge, concurring.

I am not persuaded that an association's failure to comply with the authorization steps in its bylaws before bringing suit should be treated as a jurisdictional defect that can be raised by an opposing party at any time as a means to dismiss the action. Whether the procedural steps to authorize the suit were followed or not, these homeowners' associations appear to possess a "sufficient stake in an otherwise justiciable controversy" to confer jurisdiction on the trial court to adjudicate this legal dispute. *Peninsula Prop. Owners Ass'n, Inc. v. Crescent Res., LLC*, 171 N.C. App. 89, 92, 614 S.E.2d 351, 353 (2005). Moreover, the General Statutes and the association's bylaws provide means for association members harmed by the improper commencement of this suit to seek redress from the courts if they wish to do so—either by seeking to stay or dismiss the action, or by pursuing a separate action against the appropriate parties for the unauthorized filing of the lawsuit.

Permitting a defendant to question the association's standing to bring suit where no member of the association has objected is "akin to letting the proverbial fox protect the interests of the chickens." *Port Liberte II Condo. Ass'n, Inc. v. New Liberty Residential Urban Renewal Co., LLC*, 86 A.3d 730, 740 (N.J. Super. Ct. App. Div. 2014). But I am unable to distinguish this case from our Court's earlier holding in

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Peninsula Property Owners Association, which compels us to affirm the dismissal of this action for lack of jurisdiction. I therefore concur in the majority opinion.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 1 NOVEMBER 2016)

HARTFORD v. HARTFORD No. 16-413	Moore (15CVD1404)	Reversed
IN RE A.J.P. No. 16-473	New Hanover (14JT179)	Affirmed
IN RE A.K. No. 16-368	Rockingham (15JA97-98)	Affirmed
IN RE A.M. No. 16-331	Alleghany (13JT1)	Affirmed
McLEAN v. BANK OF AM., N.A. No. 16-97	Franklin (14CVS1116)	Affirmed
SCOTT v. SCOTT No. 16-88	Cumberland (13CVD5537)	Vacated and Remanded
STATE v. BAILEY No. 16-356	Buncombe (14CRS80723) (14CRS816-818)	Affirmed
STATE v. BANKS No. 16-492	Rowan (09CRS51585)	Reversed and Remanded
STATE v. BARRETT No. 16-327	Wayne (13CRS55838-40)	No Error
STATE v. BROWN No. 16-84	Forsyth (12CRS55796)	Affirmed in part; remanded in part
STATE v. COLEMAN No. 16-305	Guilford (12CRS91617)	No Error
STATE v. COLES No. 16-223	Forsyth (14CRS55214) (14CRS55216)	No Error
STATE v. DAVIDSON No. 16-272	Macon (14CRS238) (14CRS50638) (14CRS50730)	NO ERROR IN PART, VACATED AND REMANDED FOR RESENTENCING IN 14 CRS 50638
STATE v. FRYE No. 16-362	Randolph (13CRS50415-18)	No error in part; vacate and remand in part.

STATE v. HAMMONDS No. 16-199	Mecklenburg (14CRS233245)	No Error
STATE v. HINES No. 16-287	Wilson (14CRS51791) (15CRS2)	NO ERROR IN PART; DISMISSED IN PART.
STATE v. HOGG No. 16-379	Watauga (13CRS50623) (13CRS50625)	Dismissed
STATE v. HUNTER No. 15-1265	Mecklenburg (13CRS13500)	No Error
STATE v. JONES No. 16-345	New Hanover (12CRS56062)	No Error
STATE v. KING No. 16-261	Greene (13CRS323-324)	No Error
STATE v. LILLY No. 16-277	Guilford (10CRS96049)	Affirmed
STATE v. LUNSFORD No. 16-505	Wake (05CRS81735)	Reversed and Remanded
STATE v. MARSHALL No. 16-22	Johnston (14CRS53092)	Affirmed
STATE v. STANLEY No. 16-436	Forsyth (99CRS37337-38) (99CRS37340) (99CRS49952) (99CRS49955)	VACATED AND REMANDED FOR RESENTENCING HEARING
STATE v. THOMPSON No. 16-435	Mecklenburg (12CRS217628)	No Error
STOKES v. DRUG SAFETY ALL., INC. No. 15-382	Chatham (14CVS533)	Reversed and remanded in part; Dismissed in part.

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